TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted]50

KERN RIVER COMPANY, PACIFIC LIGHT AND POWER CORPORATION, AND SOUTHERN CALIFORNIA EDISON COMPANY, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED MAY 10, 1920.

(27,675)

(27,675)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 332.

KERN RIVER COMPANY, PACIFIC LIGHT AND POWER CORPORATION, AND SOUTHERN CALIFORNIA EDISON COMPANY, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 16, 1920.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3406.

THE UNITED STATES OF AMERICA, Appellant,

vs.

KERN RIVER COMPANY, a Corporation; PACIFIC LIGHT AND POWER Corporation, and Southern California Edison Company, Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Northern Division.

1 In the District Court of the United States in and for the Southern District of California, Northern Division.

No. A.-20, Equity.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

KERN RIVER COMPANY, a Corporation; PACIFIC LIGHT AND POWER Corporation, Southern California Edison Company, Defendants.

Agreed Statement of the Case on Appeal.

Be it remembered: That on the eleventh day of September, 1914, the plaintiff filed in the above court its bill of complaint, and on the twenty-ninth day of October, 1917, this plaintiff filed in the above court its second amended bill of complaint in the words and figures as follows:

(Title of Court and Cause.)

To the Honorable Oscar A. Trippet, judge of said court:

Comes now the United States of America, by the Attorney General, and said defendant not having responded to the bill heretofore filed herein by said plaintiff, files this, its amended bill of complaint against the said Kern River Company, a corporation, and thereupon complains and shows unto your Honor:

2 I.

That the defendant, Kern River Company, is a corporation organized and existing under and by virtue of the laws of the State of

Maine, and located at Portland, Cumberland County, in said State of Maine, and is a citizen and resident of said State of Maine, but owning property and doing business in the State of California. That H. S. McKee, of Los Angeles, California, is the duly designated and appointed agent of said corporation in the State of California upon whom process running against said corporation may be served.

II.

That said corporation is organized for the purpose of building, constructing, maintaining and operating canals, ditches, reservoirs, etc., for carrying, storing and supplying water for the purpose of irrigation and for carrying, supplying and storing water for the operation of machinery for the purpose of generating and transmitting electric and other power for the supplying of mines, quarries, railways, tramways, mills and factories with electric and other power and also for the supplying of electric and other power for lighting and heating mines, quarries, mills, factories, incorporated cities and towns, villages, or towns, situated in territory other than the State of Maine, and to acquire by purchase or otherwise, buildings and other improvements in or upon which to erect, install, place, use or operate machinery for the purpose of generating and transmitting electric and other power and for any of the purposes or uses above mentioned, and to acquire, or possess, contract for, sell and trans-
3 fer water and water rights, and to contract for, and sell, in the State of California and elsewhere than in the State of Maine, electric and other power for any purpose whatsoever, as will appear by reference to said articles of incorporation, a copy of which is marked Exhibit "A," hereto attached and made a part of this bill of complaint.

III.

That on or about the 3d day of June, 1898, said defendant, by its president and secretary, being thereunto duly authorized, in conformity with the rules and regulations of plaintiff's General Land Office as to procedure, applicable thereto, and in the manner required by law, and having theretofore filed with plaintiff's Secretary of the Interior a copy of its said articles of incorporation and due proofs of its organization, filed with the Register and Receiver of plaintiff's local Land Office at Independence, California, said office being the Land Office for the District in which the lands hereinafter described are situated and application for a right of way for a canal, which said application consisted, among other things, of a certain map of survey showing the definite location of said proposed canal upon certain portions of the public domain of plaintiff lying in Townships 25, 26 and 27, South of Ranges 32 and 33 East, Mt. Diablo Meridian, said map, among other lands, including said portions of the public domain of plaintiff described in paragraph VI hereof, and accompanying said map were the field notes of said sur-

veys. Said map was refiled by said defendant in said Land Office on the 3d day of November, 1898.

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IV.

That appearing on said map and filed therewith was a certificate in writing, signed by one Chas. Forman as president of said Kern River Company, and attested by one H. S. McKee as secretary, under the seal of said corporation, certifying, among other things, that the survey of said canal as represented on said map and accompanying field-notes, was made under the authority of said company; that said canal as so represented was adopted by said company, by resolution of its board of directors on the 20th day of October, 1897, as the definite location of said canal, describing the same generally therein; that no lake or lake-bed, stream or stream-bed is used for said canal except as shown on said map, and that the map has been prepared to be filed for the approval of the Secretary of the Interior in order that the Company might obtain the benefits of Section- 18 to 21, inclusive, of the Act of Congress approved March 3, 1891, entitled "An Act to repeal timber culture laws and for other purposes," and of Section 2 of an Act of Congress approved May 11, 1898, entitled "An Act to amend an Act to permit the use of the right of way through public lands for tram roads, canals and reservoirs and for other purposes," and further certifying that the right of way for said canal was desired solely for the purposes prescribed by the aforesaid Acts. That said application, including said maps, field-notes, and certificate, were thereupon by said Register and Receiver of said plaintiff's local Land Office transmitted to and filed with the Sec-

5 retary of the Interior of the United States for approval.

V.

That on or about the 14th day of April, 1899, the Secretary of the Interior believing and relying on the representatives so made by said applicant as aforesaid, and believing that said canal was to be used by said defendant for the main purpose of irrigation, and not otherwise, approved, subject to all valid existing rights, said application for said right of way for canal according to the said map and field-notes of said survey, and thereupon, and on or about the 26th day of April, 1899, said right of way as represented by said map was noted upon the plats in said Land Office at Independence, California, by reason of the said approval of said application, and there was thereby granted to the said Kern River Company a right to the use of the right of way in said application, map, field-notes, and said certificate described for the construction, operation and maintenance of a canal for the main purpose of irrigation.

VI.

That at the date said approved map was filed in said Land Office at Independence, California, and noted on the plats of said Land

Office, the plaintiff was and still is owner, as part of the public domain, of the following described lands:

The Southeast quarter of the Southwest quarter of Section Eight, and the Northeast quarter of the Northeast quarter of Section Thirty, Township Twenty-six South, Range Thirty-three East, Mt. Diablo Meridian;

6 The Southeast quarter of the Northeast quarter, the East half of the Southeast quarter, the Southwest quarter of the Southeast quarter, and the South half of the Southwest quarter of Section Six, Township Twenty-seven South, Range Thirty-three East, Mt. Diablo Meridian;

The Southeast quarter of the Northeast quarter, the Northeast quarter of the Northwest quarter, the South half of the Northwest quarter, and the Northwest quarter of the Southwest quarter of Section Twelve; the South half of the Northeast quarter, the North half of the Southeast quarter, the South half of the Northwest quarter, the North half of the Southwest quarter and the Southwest quarter of the Southwest quarter of Section Eleven, and the Southeast quarter of Section Ten, all in Township Twenty-seven South, Range Thirty-two East, Mt. Diablo Meridian;

which said lands, prior to the application hereinbefore described, of the defendant Kern River Company for right of way for a canal thereon, were open and subject to location for right of way for a canal by a canal or ditch company under the provisions of Sections 18 to 21, inclusive, of an Act of Congress approved March 3, 1891, entitled "An Act to repeal timber culture laws and for other purposes." All of said lands are situated in the County of Kern, State of California, and within the Northern Division of the Southern District of California. And the said right of way hereinbefore

7 described and represented by said map of definite location crosses over and upon the lands hereinbefore described.

VII.

That no right, title or interest in or to any grant, tenement, privilege, easement or other benefits provided for by the provisions and conditions of said Act of Congress approved March 3, 1891, in, upon, over or through the lands described in paragraph VI hereof, were ever acquired, by the defendant Kern River Company, except at the time and in the manner and upon the terms and conditions hereinbefore set forth.

VIII.

That on or about the 19th day of January, 1905, said defendant by its President and Secretary, being thereunto duly authorized, in conformity with the rules and regulations of plaintiff's General Land Office as to procedure, applicable thereto, and in the manner required by law, and having theretofore filed with said Secretary of the Interior a copy of its said articles of incorporation and proofs of or-

ganization, filed with the Register and Receiver of plaintiff's Local Land Office at Independence, California, said office being the Land Office for the District in which the lands hereinbefore described are situated, an application for a right of way for a canal, which said application consisted, among other things, of a certain map of survey showing the amended definite location of said proposed canal upon certain portions of the public domain of plaintiff, and which said amended definite location was over a line of route the same as
8 represented on the map mentioned in paragraph III hereof, except in certain particulars shown on said map of amended definite location, said map, among other lands, including the lands described in paragraphs VI and XIV hereof, and accompanying said map were the field-notes of said surveys.

IX.

That appearing on said map and filed therewith was a certificate in writing, signed by one Charles Forman, as President of said Kern River Company, and attested by one H. S. McKee, as Secretary, under the seal of said corporation, certifying, among other things, that the survey of said canal as represented on said map and accompanying field-notes, was made under the authority of said company; that said canal as so represented was adopted by said company by resolution of its board of directors on the 23d day of January, 1905, as the amended definite location of said canal, describing the same generally therein, that no lake or lake-bed, stream or stream-bed is used for said canal except as shown on said map, and that the map has been prepared to be filed for the approval of the Secretary of the Interior in order that the Company might obtain the benefits of Sections 18 to 21 inclusive of the Act of Congress approved March 3, 1891, entitled "An Act to repeal timber culture laws and for other purposes," and Section 2 of the Act of Congress approved May 11, 1898, and that the right of way described on said map was desired for public purposes. Said map contained another certificate signed by
Charles Forman as President of Kern River Company and
9 attested by H. S. McKee as Secretary, under the seal of said corporation, in which the said Charles Forman certified that he was the President of said Kern River Company, and that the canal described was actually constructed as set forth in the affidavit of G. O. Newman, chief engineer, appearing on said map on the exact location represented on the map and by the field-notes, approved by the Secretary of the Interior on the 14th day of April, 1899, referred to in Paragraph III of this bill, except in so far as the route indicated upon the map of the amended definite location differs therefrom and that the company in all things complied with the Act of Congress of March 3, 1891, granting the rights of way for canals, ditches, etc., on the public lands of the United States. That on said map also appeared the affidavit of one G. O. Newman, subscribed and sworn to before Charles C. Taylor, notary public in and for Kern County, on the 14th day of January, 1905, stating that he was the chief engineer of said Kern River Company; that the canal of said Kern

River Company described upon said map was constructed under his survey. That construction was commenced on the 31st day of July, 1902, and completed on the 5th day of April, 1904. That the constructed canal as aforesaid conforms to the amended map and field-notes upon which said affidavit appeared, which conformed to the original location which received the approval of the Secretary of the Interior on the 14th day of April, 1899, except as indicated upon said map of amended definite location.

10

X.

That said application, including said maps, field-notes, certificates and affidavit, were thereupon by said Register and Receiver of said plaintiff's local Land Office, transmitted to and filed with the Secretary of the Interior of the United States for approval.

XI.

That on or about the 27th day of November, 1905, the Secretary of the Interior approved, subject to all valid existing rights, said application for said right of way for canal, according to the said map and field-notes of said survey, believing and relying on the representations so made by said applicant, as alleged in paragraphs III, IV, VIII, and IX herein, that said canal was to be used by said defendant for irrigation and public purposes, and not otherwise, whereas in fact said representations were untrue and false, in this, that the said defendant did not intend to use said canal for irrigation or public purposes but intended to use said canal solely for the purpose of generating electrical power for sale, and the President of said defendant had entered into an agreement under date of December 23, 1904, with Miller and Lux et al., in which said defendant agreed that all the water diverted by it in said canal should be used solely for the purpose of generating power and for no other purpose.

XII.

That the Secretary of the Interior, being deceived by said false representations, approved said application and thereupon on or about the 19th day of January, 1905, said right of way as represented

11 by said map was noted upon the plats in said Land Office at Independence, California, and by reason of the said approval of said application there was granted to the said Kern River Company a right to the use of the right of way in said application, map, field-notes, and said certificate described, for the construction, operation and maintenance of a canal for the purpose of irrigation, whereby great detriment and injury was suffered by the plaintiff in that the defendant secured a grant of the public domain under the Act of March 3, 1891, for a purpose contrary to said Act.

XIII.

Plaintiff further states that the general line of said proposed canal, as shown by both of said maps and the corresponding field-notes, is as follows: Beginning at a point in the north half of the southwest quarter of Section Thirty-three, Township Twenty-five South, Range Thirty-three East, Mt. Diablo Meridian, thence in a southwesterly direction through the south half of said Section Thirty-three, and through the northwest quarter of Section Four, and the east half of Section Five, Township Twenty-six South, Range Thirty-three East, thence in a southerly and westerly direction through Townships Six and Seven South, of said Range Thirty-three East, and through Townships Twelve, Eleven and Ten of Township Twenty-seven South, Range Thirty-two East, Mt. Diablo Meridian, to a point in the southwest quarter of the southeast quarter of said Section Ten.

That for a more specific description of said lines of route of
12 said canal and the matters and things appearing on said maps, plaintiff refers to said maps and corresponding field-notes which are hereby made a part of this bill by reference.

XIV.

That at the date said approved map was filed in said Land Office at Independence, California, and noted on the plats of said Land Office, in addition to the lands described in paragraph VI hereof, the plaintiff was and still is owner, as part of the public domain, of the following described lands:

The Southeast quarter of the Southwest quarter of Section Thirty-three, Township Twenty-five south, Range Thirty-three East, Mt. Diablo Meridian; The Northeast quarter of the Northwest quarter of Section Four, Township Twenty-six South, Range Thirty-three East, Mt. Diablo Meridian;

The Northeast quarter of the Southeast quarter of Section Five, Township Twenty-six South, Range Thirty-three East, Mt. Diablo Meridian;

The Northeast quarter of the Northwest quarter; the South half of the Northwest quarter; and the West half of the Southwest quarter of Section Seventeen, township Twenty-six South, Range Thirty-three East, Mt. Diablo Meridian;

The East half of the Southeast quarter of Section Nineteen, Township Twenty-six South, Range Thirty-three East, Mt. Diablo Meridian;

The North half of the Northwest quarter of Section Seven,
13 Township Twenty-seven South, Range Thirty-three East, Mt. Diablo Meridian;

The Northwest quarter of the Northeast quarter of Section Twelve, Township Twenty-seven South, Range Thirty-two East, Mt. Diablo Meridian;

which said lands, prior to the application hereinbefore described of the defendant Kern River Company for right of way for a canal

thereon, were open and subject to location for right of way for a canal by a canal or ditch company under the provisions of Sections 18 to 21, inclusive, of an Act of Congress approved March 3, 1891, entitled "An Act to repeal timber culture laws and for other purposes." All of said lands are situated in the County of Kern, State of California, and within the Northern Division of the Southern District of California. And the said right of way hereinbefore described and represented by said map of amended definite location crosses over and upon the lands described in this paragraph and in paragraph VI hereof.

XV.

That no right, title or interest in or to any grant, tenement, privilege, easement or other benefits provided for by the provisions and conditions of said Act of Congress, approved March 3, 1891, in, upon, over or through the lands described in paragraphs VI and XIV hereof, were ever acquired by the defendant Kern River Company, except at the time and in the manner and upon the terms and conditions hereinbefore set forth.

XVI.

14 That at the times said Kern River Company filed said maps for approval and at the time said maps were approved and noted on the plats of said Land Office, as aforesaid, the said Kern River Company had no valid appropriation of its own of any water for the purpose of irrigation that could be carried through a canal constructed upon said right of way, nor did it intend at the time of the acquisition of said right of way to construct any canal thereon for the purpose of irrigation, but said company constructed, and intended to construct, said canal, solely for the purpose of carrying water to be used in generating electric power, and not otherwise.

XVII.

That the approval of said Secretary of the Interior of the maps and applications hereinbefore mentioned was given solely by reason of the facts alleged in paragraphs III, IV, V, VIII and IX herein, through mistake, error and inadvertence in the belief that said canal was to be used for the main purpose of irrigation and that the canal would be so used by the defendant and there was attached to said grant the implied condition that said canal was to be used for the purpose of irrigation.

XVIII.

That said defendant has never used said canal for the purposes of irrigation, but has ever used and now uses the same solely for the purpose of carrying water to be used to generate electric power which the said canal company sells mainly for the purpose of furnishing motive power to certain electric railway systems in and around cer-

tain municipalities in said Southern Division of the Southern
15 District of the State of California, and for supplying light for different municipalities throughout said Southern District of California, a small part of the electricity generated by said company being sold by said company to ranchers in the Kern River Valley, who utilize said power for the purpose of pumping water to be used in irrigating their ranches.

XIX.

That on or about the 27th day of March, 1908, plaintiff's then Secretary of the Interior, through the Register and Receiver of plaintiff's local Land Office at said Independence, California, served notice upon said defendant Kern River Company, to show cause, within ninety days from date of said notice, why proceedings should not be instituted to cancel said grants of right of way upon the ground that the same were secured by the approval of said maps for the main purpose of irrigation, but were used solely for power purposes.

That thereafter, and in pursuance of said notice, said Kern River Company made answer to said notice showing its reasons why said proceedings should not be instituted.

That thereafter, and on or about the 18th day of November, 1909, the Assistant Commissioner of plaintiff's General Land Office, in pursuance of the decision of November 12, 1909, and of instructions in that behalf theretofore given by the First Assistant Secretary of the Interior, gave notice to said defendant Kern River Company that it would be given sixty days within which to further amend its said amended application appearing on the map filed January 19,
16 1905, for right of way, so as to bring the same within the provisions of the Act of February 15, 1901 (31 Stats. 790), (under which said Act said defendant was at the time of filing its said amended application, and now, is, entitled to a permit for a right of way for its said canal), provided said amended application should be accompanied by a proper relinquishment of all right and interest under the approvals given under the said Act of 1891.

That defendant has failed, neglected and refused to file such amended application, or any application at all for right of way under said Act of February 15, 1901.

Wherefore, and inasmuch as plaintiff is without full and adequate remedy at law, plaintiff prays that defendant be required to answer the premises by subpœna of this court, not under oath however, an answer under oath being hereby expressly waived, and that a hearing on the matters herein set forth may be had, and that a decree may be entered herein in favor of plaintiff setting aside the action of the Secretary of the said Interior in approving said maps, and vacating, cancelling and annulling the grant of right of way over plaintiff's said lands, acquired by said defendant by virtue of the proceedings set forth herein, and forever quieting and confirming in plaintiff, the title to said lands, as against any claim of right,

title or interest to or in the same or any part thereof by virtue of said proceedings, by said defendant, or anyone claiming under it, and enjoining said defendant from thereafter using said right of way so obtained until it has made application for the same and
17 received the approval of the Secretary of the Interior under the said Act of February 15, 1901, and for such other and further relief as to the Court may seem just and equitable.

THOMAS WATT GREGORY,
Attorney General of the United States;
J. ROBERT O'CONNOR,
United States Attorney;
CLYDE R. MOODY,
Assistant United States Attorney,
Attorneys for Plaintiff.

EXHIBIT "A."

Certificate of Organization of Kern River Co.

STATE OF MAINE:

Certificate of Organization of a Corporation under the General Law.

The undersigned officers of a corporation organized at Portland, Maine, at a meeting of the signers of the articles of agreement therefor, duly called and held at the office of Charles F. Libby, 57 Exchange St., in the City of Portland, on Monday the twenty-eighth day of June A. D. 1897, hereby certify as follows:

The name of said corporation is Kern River Company.

The purposes of said corporation are, to carry on the business of building, constructing, maintaining and operating canals, ditches, reservoirs, dams, flumes, aqueducts, pipes and pipe-lines for carrying, storing and supplying water for the purpose of irrigation; also the building, constructing, maintaining and operating canals, ditches, reservoirs, dams, flumes, aqueducts, pipes and pipe-
18 lines, for carrying, supplying and storing water for the operation of machinery for the purpose of generating and transmitting electric and other power for the supplying of mines, quarries, railroads, tramways, mills and factories situated in territory other than the State of Maine, with electric and other power, and also for the supplying of electric and other power to light and heat mines, quarries, mills, factories, incorporated cities, cities and counties, villages or towns, situated in territory other than the State of Maine; and to acquire by purchase or otherwise, from corporations, partnerships and persons, for any or all of the above purposes, properties, rights, franchises, easements and lands; and to acquire by purchase or otherwise buildings and other improvements in or upon which to erect, install, place, use or operate machinery for the purpose of generating and transmitting electric and other power, and for any of the purposes or uses above set forth, in territory other than the State of Maine; and to acquire, own, possess, contract for,

sell and transfer water and water rights, and to contract for and sell in the State of California and elsewhere than in the State of Maine, electric and other power for any purpose whatsoever, and also when deemed necessary or expedient to accomplish any of the purposes hereinabove specified, to sell, transfer, exchange, mortgage, pledge, or otherwise dispose of or encumber any or all of the property of said corporation.

The amount of capital stock is Two Million Five Hundred Thousand Dollars.

The amount of capital stock already paid in is nothing.

19 The par value of the shares is one hundred dollars.

The names and residences of the owners of said shares, are as follows, including stock in treasury unissued:

Names.	Residences.	No. of shares.
Charles F. Libby.....	Portland, Maine.....	One Share
Frank W. Robinson.....	Portland, Maine.....	One Share
Harry Butler	Portland, Maine.....	One Share
Frank H. Colley.....	Portland, Maine.....	One Share
Levi Turner	Portland, Maine.....	One Share

Unissued in Treasury, 24,995 shares.

Said corporation is located at Portland, in the County of Cumberland.

The number of directors is five, and their names are, Charles F. Libby, Frank W. Robinson, Levi Turner, Harry Butler, and Frank H. Colley. The undersigned Levi Turner is clerk, and his residence is Portland, Maine. The undersigned Charles F. Libby, is President; the undersigned Levi Turner is Treasurer; and the undersigned Charles F. Libby, Frank W. Robinson, Levi Turner, Harry Butler and Frank H. Colley are all of the directors of said corporation.

Witness our hands this twenty-eighth day of June, A. D. 1897.

CHARLES F. LIBBY,
President.
LEVI TURNER, *Treasurer.*
CHARLES F. LIBBY,
FRANK W. ROBINSON,
LEVI TURNER,
HARRY BUTLER,
FRANK H. COLLEY,
Directors.

20 STATE OF MAINE,
Cumberland, ss:

Portland, Maine, June 28, A. D. 1897.

Then personally appeared Charles F. Libby, Frank W. Robinson, Levi Turner, Harry Butler and Frank H. Colley, and severally made oath to the foregoing certificate, that the same is true.

Before me,

JOSHUA C. LIBBY,
Justice of the Peace.

STATE OF MAINE,
Attorney General's Office:

June 29th, A. D. 1897.

I hereby certify that I have examined the foregoing certificate, and the same is properly drawn and signed and is conformable to the constitution and laws of the State.

WILLIAM T. HAINES,
Attorney General.

STATE OF MAINE,
Office of Secretary of State:

I hereby certify that the foregoing is a true copy from the records of this office.

In witness whereof, I have caused the seal of the State to be hereunto affixed.

Given under my hand at Augusta, this first day of July, in the year of our Lord one thousand eight hundred and ninety-
21 seven, and in the one hundred and twenty-first year of the Independence of the United States of America.

[SEAL.] BYRON BOYD,
Secretary of State.

[Endorsed:] 4064. Filed in the office of the Secretary of State, the 27th day of February, A. D. 1902. C. F. Curry, Secretary of State. B. J. Hoesch, Deputy.

That thereafter, and on the 2d day of November, 1917, the defendant filed in said court a motion to dismiss said bill of complaint in the words and figures as follows:

(Title of Court and Cause.)

Motion of Defendant to Dismiss Bill.

Now comes the defendant, and by this motion, moves to dismiss the second amended bill of complaint filed October 29th, 1917, in the above-entitled cause on the following grounds, to wit:

First. Because it appears from said bill that the court has no jurisdiction of the subject matter of said bill, in that there is no legislative provision or law in force to authorize the institution of the suit, or any action by the court in the premises.

Second. Because it appears by the said second amended bill, that plaintiff is not entitled to the, or any, relief prayed for in and by said amended bill against this defendant.

Third. Because it appears by said second amended bill that more than six years elapsed from the date of the grant of the right of way described in the said amended bill, before this suit was
22 brought or filed, and said suit is and was, prior to the bringing thereof, barred by the provisions of Section 8 of the Act of March 3d, 1891 (26 U. S. Stats. at Large, p. 1099).

H. H. TROWBRIDGE,
GIBSON, DUNN & CRUTCHER,
Solicitors and Attorneys for Defendant.

JAS. A. GIBSON,
Of Counsel.

That thereafter said motion came on regularly to be heard in said Court sitting at Los Angeles, California, was duly argued by counsel for the respective parties and submitted to the Court for its decision and thereafter was by the Court denied.

That on April 25, 1916, the defendant duly served on the solicitors for the plaintiff and filed in said Court its answer to said bill of complaint, which was in the words and figures as follows:

(Title of Court and Cause.)

Answer.

The Answer of the Kern River Company, a Corporation, Defendant, to the Second Amended Bill of Complaint of Plaintiff, Filed Herein on the 29th Day of October, 1917.

This defendant now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material
23 or necessary for it to make answer to, answering says:

I.

Defendant believes the statements contained in the paragraphs numbered respectively I, II, III, and IV to be true.

II.

This defendant admits paragraph V of said amended bill, except in the particulars or respect hereinafter mentioned, that is to say,

that the Secretary of the Interior, on or about the 4th day of April, 1899, "believing or relying on the representations so made by said applicant as aforesaid, and believing that said canal was to be used by said defendant for the main purpose of irrigation and not otherwise, approved, subject to all valid and existing rights said application for said right of way of canal, according to the said map and field-notes of said survey"; and this defendant does not know and cannot set forth as to its belief or otherwise, whether or not it is true that the Secretary of the Interior, on the date set forth, believed or relied on the alleged representations so made by the applicant as stated in said bill, that said canal was to be used by said defendant for the main purpose of irrigation, and not otherwise; and also this defendant does not know and cannot set forth as to its belief, or otherwise, whether or not it is the fact as stated in said paragraph V of said amended bill, that the right to the use of the right of way granted to this defendant for a canal was for the construction or operation or maintenance for a canal for the main or sole purpose of irrigation.

24 III.

This defendant admits paragraph VI of plaintiff's amended bill, except that in addition thereto defendant alleges that the portion of the public domain therein described is and was, since the granting thereof, subject to the right of way and use of defendant's canal.

IV.

As to paragraph VII this defendant denies that no right or title or interest in or to any grant or tenement or privilege, easement, or other benefits provided for by the provisions and conditions of the said act of Congress, approved March 3d, 1891, in or upon or over or through the lands described in paragraph VI of plaintiff's said amended bill of complaint, were ever acquired by the defendant Kern River Company except at the time and in the manner and upon the terms and conditions thereinbefore set forth in plaintiff's said amended bill; and this defendant alleges that on, and for a long time prior to its aforesaid application for said right of way for a canal, it was the owner, by itself and predecessors in interest, of certain water rights, and the right to divert and use for purposes of irrigation and other beneficial uses the waters of the Kern River in said Kern County, California; and that it had, by itself and its predecessors in interest, diverted and used the waters of said river for domestic and irrigation purposes upon lands in said Kern County, under and by virtue of the Act of Congress approved July 26th, 1866 (Rev. Stats., sec. 2339), and the Act of Congress approved
25 March 3d 1877, to provide for the sale of desert land in certain states and the appropriation of water, and the customs and decisions of courts of the State of California, under and pursuant to Title VIII, Division II, of the Civil Code of California.

V.

This defendant admits paragraph VIII of plaintiff's said amended bill.

VI.

This defendant admits paragraph IX and paragraph X of plaintiff's said amended bill.

VII.

This defendant admits that the allegations of paragraph XI are true, except in the following particulars: That this defendant has no personal knowledge that the Secretary of the Interior approved said application, believing or relying on the representations made by the applicant as alleged in paragraphs III, IV, VIII, IX, or either of them, of said amended bill, that said canal was to be used by said defendant for irrigation, and not otherwise, and this defendant denies that said alleged representations or any representations made by this defendant in its application for said right of way referred to in said paragraph XI were untrue or false, or that this defendant did not intend to use the said canal referred to in said paragraph, for irrigation or public purposes, but intended to use the said canal solely for the purpose of generating electrical power for sale, but admits that defendant entered into the agreement of December 23d, 1904, with Miller & Lux et al., referred to in said paragraph XI of said amended bill of complaint.

26

VIII.

This defendant admits paragraph XII of plaintiff's said amended bill except that this defendant denies that the approval of the right of way represented by the map referred to in said paragraph was secured by any deception practiced upon, or any false representations made by defendant to, the Secretary of the Interior, or any other federal officer; or that by reason of the said approval of said application for the right of way, or the right to the use of the right of way, referred to in said paragraph, there was granted to this defendant the right to use the right of way in said application for the purpose of irrigation alone; and this defendant further denies that great or any detriment or any injury whatever was suffered by the plaintiff in that this defendant secured a grant of the public domain under the Act of March 3d, 1891, for a or any purpose contrary to said Act. And defendant avers that said right of way for said canal was not obtained from plaintiff or its Department of the Interior by any deception, fraud or misrepresentation.

IX.

This defendant admits paragraph XIII of plaintiff's said amended bill.

X.

This defendant admits that plaintiff was and is the owner, as part of the public domain, of the land described in paragraph XIV of said amended bill of complaint, subject to defendant's right of way thereover, for its aforesaid canal, and the use of such right of way for said canal; and this defendant says that the said land
27 described in said paragraph was also open and subject to location for a right of way for a canal, under the provisions of Section 2 of the Act of Congress approved May 11th, 1898, entitled: "An Act to amend an Act to permit the use of a right of way through public lands for tramroads, canals and reservoirs, and for other purposes."

XI.

This defendant denies that no right or title or interest in or to any grant or tenement or privilege or easements, or other or any benefits provided for by the provisions and conditions of said Act of Congress approved March 3, 1891, in or upon or over or through the lands described in paragraphs VI and XIV hereof, were ever acquired by the defendant Kern River Company, except at the time and in the manner, or upon the terms or conditions, set forth in plaintiff's said amended bill; but this defendant alleges that it acquired the right, title, estate and interest and grant of a right of way in and to and over the lands described in plaintiff's said amended bill for its said canal and the use thereof as hereinafter alleged in the second, separate defense.

XII.

That at the times said Kern River Company filed said maps for approval, and at the time said maps were approved and noted on the plats of said Land Office as stated in plaintiff's said amended bill, this defendant denies that the Kern River Company had no valid appropriation of its own of any water for the purpose of irrigation, that could be carried through a canal constructed upon said
28 right of way, and further denies that it did not intend at the time of the acquisition of said right of way for said canal; to construct any canal thereon for the purpose of irrigation, and further denies that said Company constructed or intended to construct said canal solely for the purpose of carrying water to be used in generating electric power, and not otherwise, except as limited in said contract with Miller & Lux et al. This defendant alleges that it was the owner of water rights and using such water for irrigation as hereinbefore alleged, and that in constructing its said canal it intended to divert and use the same for irrigation as well as for other beneficial uses, including the generation of electric energy as hereinafter stated.

XIII.

This defendant does not know, and cannot set forth as to its belief or otherwise, whether or not it is the fact as stated in paragraph XVII of plaintiff's said amended complaint that the approval of the Secretary of the Interior of the maps and applications therein referred to, was given solely or at all by reason of the facts alleged in paragraphs III, IV, V, VIII and IX of said amended complaint, through mistake, or error, or inadvertence, in the belief that said canal was to be used for the main purpose of irrigation, and that the canal would be so used by the defendant; and this defendant denies that there was attached to the said grant of the right of way of said canal the implied or any condition that said canal was to be used for the purpose of irrigation or irrigation only. And defendant denies
29 that the Secretary of the Interior in approving or making the grant for said right of way for said canal, did so by or through any mistake, error, or inadvertence.

XIV.

This defendant admits that it has never used said canal for the purpose of irrigation, but has ever used and now uses the same solely for the purpose of carrying water to be used to generate electric power which the said canal company sells mainly for the purpose of furnishing motor power to certain electric railway systems in and around certain municipalities in said southern division of the southern district of the state of California, and for supplying light for different municipalities throughout said southern district of California; but this defendant says that a large part of the electricity generated by the said company is being sold by said company to farmers and ranchers, along the line of the electric power distributing system of this defendant, which said power is used for the purpose of pumping water to be and which is used for irrigating land.

XV.

This defendant admits paragraph XIX of plaintiff's said amended complaint.

For a further, separate and second defense this defendant, Kern River Company, avers:

I.

That there was granted to it, as a corporation, by the United States, a right of way for a canal for the purposes of diverting and conveying water through the same for the generation of electric power, and
30 for irrigation, under and in virtue of the provisions of Sections 18 to 21, inclusive, of an Act of Congress approved March 3d, 1891, entitled: "An Act to repeal timber culture laws and for other purposes," and the provisions of Section 2 of an

Act of Congress approved May 11th, 1898, entitled: "An act to amend an Act to permit the use of a right of way through public lands, for tramroads, canals and reservoirs, and for other purposes"; that said canal is located upon and extends over the public land of the United States described in paragraph VI of plaintiff's said amended bill of complaint, and that the general line of said canal is as set forth and described in paragraph XIII of plaintiff's said amended bill. That the manner in which this defendant, Kern River Company, acquired the aforesaid grant of the right of way for said canal was and is as follows:

II.

The said Kern River Company, on or about the 24th day of September, 1897, desiring to procure a right of way for reservoir, diversion canal, and construction trail, and for two lines of poles for transmission of electric power, wrote a letter of inquiry to the Commissioner of the General Land Office, describing the application for the right of way which it desired to make, and stating the purposes for which it was incorporated. A copy of this letter is set forth hereinafter as a part hereof, and marked Exhibit "A."

III.

That thereafter, by letter dated November 12th, 1897, the Kern River Company made application to the Commissioner of the
31 General Land Office, for right of way for reservoir and diversion canals and construction trail, and for two pole lines to carry wire for the transmission of electric power, all as described in said letter. That said maps, five in number, were described in and accompanied said letter, and said letter is hereinafter set forth as a part hereof, and marked Exhibit "B." That to the said application of November 12th, 1897, the Commissioner of the General *aL*nd Office replied by letter to the Register and Receiver of the Visalia Land Office, dated April 15th, 1898, pointing out certain defects in the aforesaid maps that would have to be remedied, and stating that the right of way sought for the canal, could not be granted under the Acts of March 3d, 1891, and May 14th, 1896, as sought, and stated on said maps; a copy of which letter is hereinafter set forth as a part hereof, and marked Exhibit "C."

IV.

That thereafter the Kern River Company, defendant, reformed its application and corrected said maps and made a new application for rights of way for the aforesaid purposes, under and to conform to Sections 18 to 21 of the Act of March 3d, 1891, and Section 2 of the Act of May 11th, 1898. In this application the said defendant company stated that the use to which the canal was to be devoted was as follows: "Right of way for a canal for the purpose of irrigation and the subsidiary purpose of the development of power as particu-

larly described in the map filed herewith, marked Exhibit "F." A copy of said map was filed in the United States District Land
32 Office at Visalia, California, May 25th, 1898, and in the United States District Land Office at Independence, California, June 3d, 1898. That after consideration by the Department of the Interior as to the proposed use of the right of way sought, the aforesaid application was approved by E. A. Hitchcock, Secretary of the Department of the Interior, on April 14th, 1899.

V.

And this defendant, relying upon the grant of said right of way for said canal, made on the 14th day of April, 1899, in good faith began, on the 31st day of July, 1902, the construction of a canal upon the right of way so granted to it, and completed said canal on or about the 31st day of December, 1904, and also in the meantime it constructed and completed, upon rights of way granted to it by plaintiff, two electrical transmission lines, and a power house for the generation of electrical power and energy, with water carried by and through said canal.

That said canal has an approximate capacity of 30,000 miner's inches of water, and is about eleven miles in length, and from 24 feet to 32 feet in width on top, and 15 feet to 23 feet in width on bottom, and 9 feet in depth, and throughout its entire length, excepting where it is connected with wooden flumes across the Kern River and other ravines is lined and fortified with cement construction to give said canal stability and impermeability. That the lower terminus of said canal connects with the power-house located on the southeast quarter of Section 10, Township 27 South, of Range 32 East, M. D. M., and on this power-house site is erected hydro-
33 electric generating house and appurtenances; and the equipment of the power-house consists of four 3,600 h. p. and one 3,200 h. p. water-wheels operating under a static head of 232 feet, each wheel being directly connected to a 2,000 k. w. 3-phase 50-cycle 2,200-volt generator. The capacity of the generating plant in kilowatts is 10,000, equal to 13,405 h. p. Said canal and said generating plant, exclusive of the transmission line, cost about $1,937,000. The electricity generated is transmitted over pole lines consisting of poles and copper wires, with telephone lines used in the operation of the plant. The transmission line consists of two parallel pole lines, each pole line supporting one 60,000 volt 3-phase circuit, and one wholly metallic telephone circuit. The length of each pole line from the power-house to the city of Los Angeles is 127 miles, and the cost of transmission lines and telephones was $1,064,000, making the total cost of said canal, electric generating plant and transmission line $3,001,000.

That the definite location for said right of way for said pole lines was approved by the Secretary of the Interior on or about the 28th day of December, 1904. And the application for the final location of said power-house site was approved by the Secretary of the Department of the Interior on or about the 19th day of September,

1903. That the operation and use of said canal, generating plant and transmission line for the generation and transmission of power in and from said hydro-electric generating plant to the City of Los Angeles was commenced on or about the (5th day of April, 1904), and has been so operated continuously until the present time, with the exception of brief periods of stoppage for necessary repairs. That this defendant, on the aforesaid 5th day of April, 1904, being, and for a long time prior thereto having been, by itself and predecessors in interest, the owner of the right to divert and use from the waters of the Kern River in said Kern County, California, 40,000 miner's inches of water under a four-inch pressure (each miner's inch being the equivalent of 1/50 of a cubic foot per second), diverted into its aforesaid canal, to its capacity of approximately 30,000 miner's inches of said amount of water, and conveyed the same through said canal to the power-house for the generation of electric power as aforesaid, and there used said water for the generation of electric power, and has diverted and used said amount of water, subject to seasonal variation in quantity, ever since, excepting when the said water was turned out of the canal temporarily during short periods, for necessary repairs to the said canal or electric generating machinery in the said power-house.

31st day of December

34

V-A.

In the construction of said canal it became necessary, owing to topographical features and difficulties on the ground, to deviate at certain places from the line of the canal right of way as shown on the maps approved April 14th, 1899, and an amended application was made to the Commissioner of the General Land Office for a right of way to cover the aforesaid deviations, under the Act of March 3d, 1891, and May 11th, 1898, and an amended map was made to cover the deviations, and an application accompanying said map for a line of right of way to conform to the deviation so made was transmitted to the Department of the Interior. This application was acknowledged by the acting Commissioner of the General Land Office, J. H. Fimple, by letter dated July 29th, 1905, addressed to the Register and Receiver at Visalia, California, a copy of which letter is hereinafter set forth as a part hereof, and marked Exhibit "D."

35

In this letter the acting Secretary said:

"The company's attention is called to the fact that unless the canal as shown by the amended survey of the amended definite location is desired for the purpose of irrigation only, the application cannot be granted under the Act of March 3d, 1891, under which it is filed, but should be filed under the Act of February 15th, 1901, which grants permission to use the right of way over the public lands for irrigation and other purposes. See 32 L. D. 452, Denver, N. & P. Ry. Co. v. Hydro-Electric Power Co."

With this letter the amended map was returned for certain corrections, and after the corrections were made, the maps were again

sent to the Register at the Land Office at Visalia, and were by him transmitted to the General Land Office on July 5th, 1905. The acting Secretary of the Interior, by letter under date of October 4th, 1905, returned the map to the Commissioner of the General Land Office without approval, for want of the certificate of the president of the Kern River Company to the map, showing that the
36 survey was adopted by the company as the amended definite location of the canal, and not as the definite location. Thereafter the required certificate was furnished, a copy of which is hereinafter set forth as a part hereof, marked Exhibit "E" This amended map was thereafter submitted to the Secretary of the Interior for his approval, and after full discussion with and consideration by the Department of the question respecting the use of the right of way of the canal for uses other than irrigation, the Secretary of the Interior, on November 27th, 1905, approved, subject to all valid, existing rights, the aforesaid amended map of the right of way for said canal.

VI.

That the Kern River Company, upon the definite location of its canal as aforesaid, conveyed by deed to the United States Government, those portions of the right of way previously granted on April 14th, 1899, and not required or used, which said conveyance was accepted.

VII.

That on December 28th, 1904, the Secretary of the Department of the Interior addressed a letter, relative to the right of way for the electrical transmission lines to the commissioner of the United States Land Office, which letter is set forth hereinafter as a part hereof, and marked Exhibit "F."

That on October 4th, 1910, the United States Department of Agriculture, by the Secretary of said department, issued to this defendant, a permit to use and occupy in the Sequoia National For-
37 est, the aforesaid electrical power transmission lines, and power-house site, which permit is hereinafter set forth as a part hereof and marked Exhibit "G." That this permit superseded a former permit dated July 9th, 1907, granted by said Department of Agriculture, which said former permit superseded a permit theretofore granted by the Department of the Interior for electric transmission lines and power-house site.

VIII.

That the aforesaid grant of said right of way for defendant's canal was not obtained by defendant from the plaintiff or the Department of the Interior by any fraud or misrepresentation; and that the Secretary of the Interior did not, in approving the grant of said right of way for said canal, do so through any mistake, or error, or inadvertence.

This defendant avers that the application for rights of way for said canal and said electrical transmission lines were applied for at the same time as shown by the aforesaid Exhibits "A" and "B"; and that it was then the intention and purpose of this defendant to use the water to be conveyed in said canal for irrigation and for the generation of electrical power. That it entertained such intention and purpose until on or about the 23d day of December, 1904, when, to end and compromise certain pending litigation, it entered into the aforesaid compromise agreement between Miller & Lux et al. and the Kern River Company, referred to in paragraph XI of plaintiff's said amended complaint.

And for a separate and third defense, defendant avers:

38

I.

That it does not appear from plaintiff's said amended bill that there is any legislative provision or law of the United States in force to authorize the institution or prosecution of the above-entitled suit.

II.

That it appears in and by plaintiff's said amended bill of complaint that more than six years elapsed from the 14th day of April, 1899, the date of the first approval of the said grant of right of way for said canal; and also from the 27th day of November, 1905, the date of the amended grant of the right of way for the canal described in said amended bill, before this suit was brought or filed, on, to wit, September 11th, 1914; and that said suit is and was, prior to the commencement thereof, barred by the provisions of Section 8 of said Act of March 3d, 1891.

III.

That the plaintiff and its aforesaid Interior Department and its aforesaid Agriculture Department have had, at all times since the aforesaid grants of right of way for the said canal was made as hereinbefore stated, full knowledge of the purpose to use, and of the use by this defendant of, the said canal, electrical generating powerhouse generating electric energy, and transmission lines for the generation and transmission of electric energy from said powerhouse to the city of Los Angeles and vicinity for distribution to its various customers in and about the said city of Los Angeles in the State of California, and that having such full knowledge of this defendant's acts and the use of said property, plaintiff, nor
39 either of its said departments, has, at no time prior to the filing of the original complaint herein on the 11th day of September, 1914, threatened or brought suit against this defendant on account of the use of the said electrical generating property, except as stated in paragraph XIX of plaintiff's said amended complaint; but on the contrary plaintiff and its several aforesaid depart-

ments have, with full knowledge, acquiesced in and permitted, and failed to object to the continuous use by defendant of the aforesaid hydro-electric generating property, and plaintiff is guilty of laches of a duration of nine or more years prior to the filing of its said original bill of complaint herein, on, to wit, the 11th day of September, 1914.

Wherefore, this defendant prays to be hence dismissed with its reasonable costs and charges in its behalf most wrongfully sustained.

KERN RIVER COMPANY,
By G. C. WARD,
[SEAL.] *President.*

Attest:
O. V. SHOWERS,
Secretary.

GIBSON, DUNN & CRUTCHER,
Solicitors for Defendant.

40 EXHIBIT "A" TO ANSWER.

Letter, September 24, 1897, Kern River Co. to Commissioner, General Land Office.

(Ante, Page 8.)

September 24, 1897.

Commissioner General Land Office,
Washington, D. C.

DEAR SIR:

The Kern River Co.—a corporation, organized for the purpose of irrigation and the generation and electrical transmission of power—is preparing to file, in your office, an application for right of way over the Sierra Forest Reservation, for a canal, reservoir site and transmission line.

This application is being framed in accordance with circular of instructions, issued by the General Land Office, and approved February 20th, 1894, entitled "Regulations Concerning Right of Way for Canals, Ditches, and Reservoirs over Public Lands and Reservations for the purpose of Irrigation."

These instructions require the filing (see Par. 5, pg. 9) of certain maps (in duplicate) and certain papers (showing the regularity of the company's organization and procedure) with the Register of the land district in which the location is to be made.

These maps are to be filed in duplicate with the local land office, in order that the local office may keep one, and send the other, with the papers before mentioned, to the General Land Office.

41 In the case of the Kern River Co. the lines lie partly in the Independence, and partly in the Visalia Districts. This is a case not provided for in the circular of instructions, and we will be obliged if you will furnish us with further instructions in the matter.

A full compliance with the circular of instructions would require the filing, in each office, of duplicate maps showing only so much of the system as lay in that district; and also a set of papers in each office. By doing this you would receive two incomplete maps and one superfluous set of papers.

We are of the opinion that it would better serve the purposes of simplicity and convenience in your office, and lesson the expense and delay to this company, were we to file duplicate maps of our whole system, and the required papers, in only one office (say the Visalia) and let them be forwarded, thus complete in one set, from there to your office; and then file a single map in the other local office (say the Independence) showing the part of the system lying in that district; for the local use and information of that office.

If you will kindly send us your instructions in this matter we will be greatly obliged.

Yours very truly,

KERN RIVER COMPANY,

(Signed) By CHAS. FORMAN,
President.

42 EXHIBIT "B" TO ANSWER.

Letter, November 12, 1897, *Kern River Co. to Herman.*

(Ante, page 8.)

November 12, 1897.

Honorable Binger Herman,
Commissioner General Land Office,
Washington, D. C.

DEAR SIR:

The Kern River Company, a corporation duly incorporated for the purposes of irrigation, and the generation and distribution of electric power, hereby makes application to the Commissioner of the General Land Office and to the Secretary of the Interior for rights of way as follows:

(1). Right of way for a reservoir as particularly described in a map marked Exhibit "A."

(2). Right of way for a diversion canal for the purpose of concentrating drainage from watersheds, as particularly described in a map marked Exhibit "B."

(3). Permission to construct a trail for the purpose of transporting materials, as particularly described in a map marked Exhibit "B."

(4). Right of way for a canal as particularly described in a map marked Exhibit "C," "D."

(5). Right of way for two lines of poles to carry wires for the transmission of electric power, as particularly described in a map marked Exhibit "E."

All of the said works lie within the boundaries of the Sierra Forest Reservation, in the State of California; and are particularly
43 described in the maps and papers which are forwarded today to the United States Land Offices at Independence and at Visalia, in compliance with the requirements set forth in the published instructions and regulations of your Department, concerning such applications.

This application is made in order that the Kern River Company, a corporation organized for the purposes of irrigation and the generation and distribution of electric power, may obtain the benefits afforded under an act of Congress approved March 3d, 1891, granting right of way for canals, ditches and reservoirs through the public lands of the United States; and under an amendment to said act, approved May 14th, 1896, entitled "An Act to amend an act approved March 3d, 1891; granting the right of way upon the public lands for reservoir and canal purposes."

The maps and papers which accompany this application have been prepared and filed in accordance with the instructions contained in the pamphlets of regulations issued from your Department and approved February 20, 1894 and December 23, 1896.

As the instructions do not specify the manner or place of filing this application and for the sake of convenience to the Honorable Commissioner, a duplicate of it will also be found to accompany the various papers required to be filed in making this application;
44 and which have been forwarded to the United States Land Office at Independence, California.

Very respectfully.

(Signed) KERN RIVER COMPANY,
By CHAS. FORMAN,
President.

Attest:

H. S. McKEE,
Secretary.

EXHIBIT "C" TO ANSWER.

Letter, April 15, 1898, Herman to Register and Receiver, Visalia, Cal.

(Ante, page 9.)

1897—116,675.

Department of the Interior.

General Land Office.

Washington, D. C.

April 15, 1898.

Register & Receiver,
Visalia, California.

SIRS:

With his letter of Dec. 16, 1897, the register transmitted two maps, not in duplicate, filed by the Kern River Company as part of its application for permission to use right of way over public lands for canal and pole lines; and for necessary grounds for power plant, for the purpose of generating and distributing electric power. Both maps were filed as stated in order to obtain the benefits of Secs. 18 to 21, act of March 3, 1891 (26 Stat., 1095), and the act of May 14, 1896 (29 Stat., 120).

Map No. 1, (marked Exhibit "E") shows the survey line of right of way for two lines of poles each covering ground to the
45 width of 25 feet and extending side by side their entire length from a point in the S. W. ¼ S. E. ¼ Sec. 10, T. 27 S., R. 32 E., to the S. E. corner Sec. 34, T. 28 S., R. 32 E.

Map No. 2 (marked Exhibit- C & D) shows a canal line from a point in the S. E. ¼ Sec. 33, T. 25 S., R. 33 E., to a point in S. W. ¼ S. E. ¼, Sec. 10, T. 27 S., R. 32 E., a distance of 12.43 miles. Also 20 acres for power plant covering the E. ½ of S. W. ¼, S. E. ¼, Sec. 10, T. 27 S., R. 32 E.

The Department has held that "The two acts of March 3, 1891, and May 14, 1896, are so different in the character of estates or permission therein provided for, as well as in the uses to which the right of way may be devoted and the extent of such right of way, that no permission or grant can be sanctioned which is based on the two acts" (H. W. O'Melveny, 24 L. D., 560).

The act of May 14, 1896, authorized the granting of permission to use right of way to the extent of twenty-five feet. The present application is for a canal from 35 to 45 feet in width, and for two pole lines each 25 feet in width adjoining each other throughout their entire length of about 12 miles making practically a single right of way twice the width allowed by law. The canal map is drawn on a scale of 500 feet to an inch.

The company claims that a larger scale than 2,000 feet to an inch, as required by the regulations, is necessary to properly show the proposed works. The present map is too large for convenient examination and filing; and if the field-notes were furnished separately typewritten with clear carbon copy preferred, with only the numbers of the station or courses written along the line of survey, it would seem that a map thus drawn on the required scale, would be sufficiently large.

46

Map No. 2, includes grounds for power plant. Additional evidence should be furnished showing specifically that the tract is required to its full extent and for what purposes and its location and extent should be described in forms 3 & 4 as required by par. 5, Cir. Dec. 23, 1896, (23 L. D., 519). In said forms reference is made to "spill way and other requisite accessories," as nothing of the kind is shown on the map such references should be omitted.

The canal line is partly in the Visalia and partly in the Independence land districts. Duplicate map and field-notes should be filed in one office and a single set in the other (par. 2, Cir. Dec. 23, 1896). Map No. 1, and field-notes fail to show connection with nearest existing corners of public survey at the intersection of the line of survey with section lines north of section 34, T. 27 S., R. 32 E.

The land involved is all within the Sierra Forest Reserve; it would be necessary, therefore, before any of the maps could be approved, for the company to file an agreement stipulating not to take any timber from the lands within the reserve, outside of the proposed right of way (Hamilton Irrigation Co., 21 L. D. 330).

In accordance with Department circular of March 21, 1898, amending Sec. 11 of the rules and regulations governing Forest Reservations the applicant will be required to give bond in a satisfactory surety company to the Government of the United States, to be approved by the Commissioner of the General Land Office, such bond stipulating "that the makers thereof will pay the United States for any and all damage to the public lands, timber, natural curiosities or other public property on such reservation or upon lands of the United States, by reason of such use and occupation of the reserve, regardless of the cause or circumstances under which such damage may occur."

47

In view of the foregoing this office must refuse to submit maps for approval in their present form.

You will send the enclosed copy of this letter to the company and allow it sixty days in which to file new maps in accordance with the above suggestion, or appeal.

Very respectfully,

(Signed) BINGER HERMANN,
Commissioner.

EXHIBIT "D" TO ANSWER.

Letter, July 29, 1905, Acting Commissioner to Register and Receiver, Visalia, Cal.

(Ante, Page 12.)

"F."
C. C. K.

1905—16,718—26,705—69,710.

Department of the Interior,

General Land Office.

Washington, D. C., July 29, 1905.

Register and Receiver,
Visalia, California.

SIRS:

By letter of January 19, 1905, you transmitted map and
48 field-notes, in duplicate, together with other papers filed by the Kern River Company under the act of March 3, 1891, (26 Stat., 1095), showing the amended survey of the amended definite location of its canal from a point in Sec. 33, T. 25 S., R. 33 E., M. D. M., on the Kern River to a point in Sec. 10, T. 27 S., R. 32 E., M. D. M., a distance of 63,019.7 feet. And by letters of Feb. 4, 1905, and April 20, 1905, the register of the Independence, California, land district transmitted triplicate copy of said map, and stipulations and bond in the sum of $1,500. The application has been examined with the following results.

This map is filed by the company as an application showing the amended survey of the amended definite location of its canal shown on its map filed June 3, 1898, under the act of March 3, 1891 (26 Stat. 1095), which was approved by the Secretary of Interior on April 14, 1899.

The new map filed shows the deviation of the amended survey from that of the survey shown on the approved map, and the company has filed a relinquishment, under seal, of all rights acquired under the former approval as to the portions amended, but the company has failed to place on the map forms 3 and 4 found on pages 21 and 22, circular of June 26, 1902, which, to conform to the facts of this application, need be changed only in describing the line of survey as the "amended survey" and the "amended definite location" of the canal. See paragraph 26, circular June 26, 1902.

49 The company has placed on the map forms 5 and 6, found on page 22 of the circular, which, if the canal as shown by the amended survey on the map has been constructed, should remain, but if the canal has not been constructed as shown by the amended survey, they should not appear thereon.

The company has failed to furnish the data required by the 7th,

9th and 11th subdivisions of paragraph 5, circular of June 26, 1902, which must be furnished.

The company's attention is called to the fact that unless the canal as shown by the amended survey of the amended definite loc*ta*ion is desired for the purpose of irrigation only, the application cannot be granted under the act of March 3, 1891 (26 Stats., 1095), under which it is filed, but should be filed under the act of Feb. 15, 1901, (31 Stat., 790), which grants a permission to use the right of way over the public lands for irrigation and other purposes. See 32 L. D., 452, Denver, Northwestern & Pacific Ry. Co. vs. Hydro-Electric Power Co.

The bond is not acceptable for the reason that only the date of the filing of the triplicate copy of the map in the Independence land district is given, when the filing of the map in duplicate in the Visalia land district and the date thereof should also be stated in the proper blank space in the bond. As no changes or erasures can be made after the bond has been executed, a new bond must be furnished, a blank form of which is herewith enclosed, and attention is called to the printed instructions on the back thereof.

The map in triplicate is herewith returned, which, together with the blank form of bond and enclosed copy of this letter, you will forward to the company, who will be allowed a reasonable time within which to comply with the foregoing requirements.

As the triplicate copy of the map has been filed in the Independence land district office, it need not be refiled in that office, but all the maps and papers, in order that they may be kept together, may be refiled in your office.

Very respectfully,

(Signed) J. H. FIMPLE,
Acting Commissioner.

EXHIBIT "E" TO ANSWER.

Application of President of Kern River Co. for Right of Way, etc.

(Ante, Page 12.)

Applicant's Certificate.

I, Chas. Forman, do hereby certify that I am president of the Kern River Company, a corporation organized and existing under the laws of the State of Maine, that is applicant for the Right of Way for canal described on this map. That H. Hawgood who subscribed the accompanying affidavit, is the chief engineer of the said company; that the survey of the canal, as accurately represented on this map and by the accompanying field-notes, was made under the authority of the company; that the said canal as represented on this map and said field-notes, was adopted by the company, by resolution of its board of directors on the 20th day of October, 1897, as the definite location of said canal, described as follows: the initial point

of said survey being N. 28° 09′ E. 2762 feet distant from the ¼ Sec. corner between Secs. 33 & 4 Townships 25 & 26 south, range 33 east M. D. M. The length of said canal being 66,400 feet and the
51 terminal point thereof being N. 81° 12′ W. 1691 feet distant from the S. E. corner of Sec. 10, township 27 south, range 32 east M. D. M. and that no lake or lake-bed, stream or stream-bed, is used for the said canal except as shown on this map; and that the map has been prepared to be filed for the approval of the Secretary of the Interior in order that the company may obtain the benefits of sections 18 to 21 inclusive of the act of Congress approved March 3, 1891, entitled "An act to repeal timber culture and for other purposes," and of section 2 of an act of Congress approved May 11, 1898, entitled "An act to amend an act to permit the use of the right of way through public lands for tram roads, canals and reservoirs and for other purposes," enlarging the purposes for which right of way granted under said sections 18 to 21 of the act of March 3, 1891, may be used. And I further certify that the right of way for said canal is desired solely for the purposes prescribed by the aforesaid acts.

[Corporate Seal.] CHAS. FORMAN,
President of the Kern River Company.

Attest:
H. S. McKEE,
Secretary.

52 EXHIBIT "F" TO ANSWER.

Letter, December 28, 1904, Hitchcock to Commissioner of General Land Office.

(Ante, Page 13.)

Department of the Interior,
Washington, D. C., December 28, 1904.

The Commissioner of the General Land Office.

SIR:

Under cover of a letter of the 19th instant to the Department, you submitted, with related papers, four maps, filed by the Kern River Company under the act of February 15, 1901, showing the amended definite location of its line for the purpose of transmitting and distributing electrical energy.

The several sections of line covered by the maps cover a distance of 29.26 miles within the Visalia, Independence and Los Angeles land districts, California, the line shown on Map 4, being within the limits of the Pine Mountain and Zaca Lake Forest Reserve.

The Acting Director of the Geological Survey has informed you that approval will not interfere with any project now under contemplation by the Reclamation Service and the forestry officers have reported favorably in the premises.

The Company has supplied the stipulations required by the regulations under the Act as well as bond in the sum of $3,000.00 which you have approved and you have reported that the papers and
53 maps conform to the regulations and the township plats.

Among the papers is a formal relinquishment by the company of the permission for the use of right of way which it secured from the Department on July 9, 1903, and shown on four maps on which Departmental certificates were endorsed, so far as the right of way shown on such maps is not included within the right of way shown on the maps now before me.

In view of the foregoing and in accordance with your recommendation I hereby accept the relinquishment filed by the company and have granted permission to use the right of way shown on the maps by my endorsement thereon to that effect.

The enclosures in your letter are returned herewith.

Very respectfully,

(Signed) E. A. HITCHCOCK,
Secretary.

54 EXHIBIT "G" TO ANSWER.

Transmission Line Permit, Issued by Secretary of Agriculture, Dated October 4, 1910.

(Ante, Page 13.)

A true and attested copy.

(Signed) H. S. GRAVES,
Forester.
F. L.

United States Department of Agriculture.

Forest Service.

Sequoia National Forest, Uses
Kern River Company, Power,
Power House and Transmission Line.

March 19, 1904.

Transmission Line Permit.

Permission is hereby granted to the Kern River Company, a corporation organized and existing under the laws of the State of Maine, and having an office and principal place of business at Los Angeles, California, to maintain an electric power transmission line over approximately 32 miles within the boundaries of the Sequoia National Forest, California, and to occupy approximately 40 acres of land as a powerhouse site, said power house site being described as the W./2 S. E./4 S. E./4, and the E./2 S. W./4 S. E./4,

Sec. 10, T. 27 S., R. 32 E., M. D. M., and the said transmission line extending from the said power house site in a general southerly and southeasterly direction to a point on the south boundary line of the said National Forest on the south line of Sec. 36 T. 31 S.,
55 R. 33 E., M. D. M. The power house site and a part of the transmission line being as shown on a certain "map showing amended definite location of Kern River Company's transmission line" filed with and made a part of that certain "Special Use Agreement" signed in duplicate by the Kern River Company on the 9th day of July, 1907, and approved by Acting Forester James B. Adams, August 24, 1907, that portion of the transmission line not shown on the above mentioned tracing being as shown on certain maps designated as "Map No. 1" and "Map No. 2" filed in the United States Land Office at Los Angeles, California, June 29, 1904, blue-prints of the said map No. 1 and the said Map No. 2 being on file in the Forest Service, the said power house site and transmission line to be used for and in connection with the generation and conveying of electric power for commercial uses, the permission herein granted being subject to compliance by the Kern River Company (hereinafter called the permittee) with the following special conditions:

1. The Permittee shall pay to the First National Bank of San Francisco, California (United States Depositary), or such other depositary or officer as shall hereafter be duly designated by the United States, to be placed to the credit of the United States the sum of $200 annually in advance from July 1, 1910, credit to be given on the first annual payment for the sum of $50, being one-half the amount stipulated in the above mentioned "Special Use Agreement" as annual rental from January 1 of each year, provided the payment due on January 1, 1910, has been made by the Permittee,
56 the said "Special Use Agreement" being superseded by this permit.

2. The Permittee shall clear the land along the transmission line and around the power house and appurtenant buildings for such width and in such manner as the Forest officers may direct, payment for any merchantable timber cut or destroyed by the Permittee to be made to the United States Depositary, as above set forth, at such rates and at such times as may be fixed and specified by the Forest Supervisor, such rates to correspond with the prevailing stumpage rates in the said National Forest for like material, at the time the timber is cut, injured, or destroyed.

3. The Permittee shall protect all Forest Service and commercial telephone lines at crossings and at all places of proximity to the transmission line, in the standard manner and satisfactorily to the Forest Officers and shall maintain the line in such manner as not to injure stock grazing in the Forest.

4. The Permittee shall sell electric power to the United States when requested at as low a rate as is given to any other purchaser for a like use at the same time.

5. This permit is subject to all valid claims.

6. The Permittee and its employees shall do all in their power both independently and upon the request of Forest officers to prevent and suppress Forest fires.

7. The Permittee shall dispose of all brush and other refuse resulting from the unnecessary clearing or cutting of timber on the lands occupied under this permit at such time and in such
57 manner as shall be directed by the Forest officers.

8. No person undergoing a sentence of imprisonment at hard labor imposed by any court of the several States, Territories, or municipalities having criminal jurisdiction, shall be employed in the performance of this contract. (Executive Order, May 18, 1905.)

9. No member of or Delegate to Congress, or Resident Commissioner, after his election or appointment, and either before or after he has qualified and during his continuance in office, and no officer, agent or employee of the Government, shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract or agreement is made for the general benefit of such incorporation or Company. (Sec. 3741 R. S. and Secs. 114-116 Act of March 4, 1909).

Dated at Washington, D. C., this 4th day of October, 1910.

(Signed) JAMES WILSON,
Secretary of Agriculture.

That thereafter and on November 19, 1918, said cause came on regularly for trial before said Court, sitting at Los Angeles, California, and at said trial the following evidence was introduced and proceedings had, to wit:

It was stipulated in open court by counsel for the respective parties and said stipulation was duly and regularly filed in the words and figures as follows:

58 (Title of Court and Cause.)

Stipulation of Agreed Facts.

In the above-entitled cause, in order to facilitate the trial thereof, It is hereby stipulated, by and between the respective parties thereto, that the following facts shall be received and considered upon the trial of said cause, as evidence, subject to all legal objections as to materiality or competency thereof made upon the trial:

I.

The Government in this case is seeking to enjoin the Kern River Company from using, for the development of electrical power, a

right of way for a canal on Government land within the boundary of the Sequoia National Forest, acquired under the Act of March 3d, 1891, and the Act of May 11th 1898, and to cancel the grant made, and to require the Company to secure a permit from the Secretary of Agriculture in accordance with the provisions of the Act of February 15th, 1901. (31 Stat. 790.)

II.

The Kern River and Los Angeles Electric Power Company was organized and incorporated May 18th, 1895, under the laws of the State of Arizona. Its President was Charles Forman; its Secretary, H. S. McKee; and its Engineer H. Hawgood. The object of the project was as follows:

"The intent and object of the enterprise is to use the flow of the north fork of Kern River for the generation of electrical en-
59 ergy, and to convey and sell the same to various consumers as far as Los Angeles. It is probable that eighty per cent of the total power generated would go to that city. The remaining twenty per cent being disposed of to the mining, milling and agricultural interests embraced in the first seventy miles of the line. (Company's Prospectus, p. 11, Exhibit 1.)"

III.

This company was succeeded by the Kern River Company, a corporation organized and existing under the laws of the State of Maine, June 28th, 1897, with the same officers. The purpose was to develop the same projects. The water rights in Kern River purchased by the first named company were deeded to the Kern River Company on July 17, 1897. These water rights were the following (Exhibit 2):

Oct.	18, 1894,	J. W. Eddy	25,000 in.
April	24, 1895,	J. W. Eddy	35,000 "
Dec.	23, 1894,	E. H. Gale	35,000 "
June	19, 1895,	Kern River & L. A. Elec. Power Co.	35,000 "
June	20, 1895,	Kern River & L. A. Elec. Power Co.	35,000 "
July	2, 1895,	Kern River & L. A. Elec. Power Co.	5,000 "

The company also acquired the following water appropriations (Exhibit 3):

Sept.	22, 1897,	Kern River Company	800 Sec. ft.
Nov.	4, 1897,	Kern River Company	800 " "
Sept.	28, 1897,	Kern River Company	100 " "
June	19, 1899,	Kern River Company	40,000 in.
June	19, 1899,	Kern River Company	40,000 "

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Dec.	19, 1901,	Wm. G. Kerkchoff	5,000 "
Dec.	15, 1901,	Wm. G. Kerkchoff	10,000 "

Feb.	12, 1902,	Wm. G. Kerkehoff	5,000	"
Mar.	8, 1902,	G. O. Newman	30,000	"
Mar.	9, 1902,	G. O. Newman	30,000	"
Mar.	15, 1902,	G. O. Newman	30,000	"
Mar.	15, 1902,	T. M. Shaw	30,000	"
June	15, 1903,	Kern River Company	5,000	"
July	1, 1905,	H. S. Fisher	1,000	"
July	1, 1905,	H. S. Fisher	1,000	"

IV.

The Kern River Company on June 3d, 1898, filed a map of a right of way for its proposed canal under Secs. 18 to 21 of the Act of March 3, 1891 (26 Stats. 1095), and Sec. 2 of the Act of May 11, 1898 (30 Stats. 404), in the Land Office at Independence, California. This map was refiled on November 3, 1898 (Exhibit 4). The Secretary of the Interior on April 14, 1899, approved this right of way subject to all valid existing rights.

V.

The plans of the Kern River and Los Angeles Electric Power Company and the Kern River Co. contemplated the construction of a diversion dam and canal to take temporarily from Kern River a large volume of water for the development of power, the water to be returned to the river below the outlet of the canal.

VI.

Construction of the canal began on July 31, 1902, which construction conformed to the right of way shown on Exhibit 4, except for certain deviations which were later shown on an amended map. Operation of the power plant began December 31, 1904.

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VII.

April 17th, 1903, a suit, (No. 4470) was filed in the Superior Court of Kern County by Miller and Lux et al., against the Kern River Company, et al., to restrain the defendants from diverting water from the Kern River. This suit was later transferred to the Federal Court, Southern District of California, and was numbered 56 Equity. On March 24, 1904, another suit (No. 4739) was filed in the Superior Court of Kern County by Miller and Lux Co. vs. A. Brown Co., Kern River Co., et al. A final decree was entered in the State Court (Exhibit 5). As a result of these suits, on December 23, 1904, the Kern River Company, through its President, entered into an agreement with Miller and Lux, et al., in which the Company agreed that all water diverted by it in said canal should be used solely for the purpose of generating power and for no other purpose. This agreement was incorporated in the final decree in suit No. 4739. A copy of this contract is hereto attached and marked Exhibit 6.

VIII.

On January 19, 1905, the Kern River Company filed a map of amended definite location of the right of way for canal under the Acts of March 3, 1891, and May 11, 1898. This map was refiled September 2, 1905 (Exhibit 7). The Secretary of the Interior on November 27, 1905, approved this amended right of way upon relinquishment by the company of those portions of the grant
62 of April 14, 1899, not used, subject to all valid existing rights. The Government land involved is described in paragraphs VI and XIV of the bill.

IX.

The right of way, as shown by these two maps of location, for a canal has been used since the time the power plant went into operation December 31st, 1904, for the development of electrical power for sale. Prior to this time no use was made of the canal, except construction work thereon.

X.

On March 12, 1908, the Secretary of Agriculture reported to the Secretary of the Interior that the Kern River Company was using its right of way for power purposes instead of irrigation (Exhibit 8). September 27, 1908, the Secretary of the Interior, through the Register and Receiver of the Independence Land Office, served notice on the Kern River Company to show cause within 90 days why suit should not be instituted to cancel said grants. Thereafter the Kern River Company, in response to the notice to show cause, filed an answer. In a decision dated November 12, 1909, the Secretary of the Interior decided that the grant had been made for irrigation purposes and not for the development of electrical power. (Exhibit 9.) November 19, 1909, the Commissioner of the General Land Office, pursuant to instructions from the Secretary of the Interior, gave the company 60 days' notice to amend the application filed June 19, 1905, to bring it within the Act of February 15, 1901 (31
63 Stats. 790) (Exhibit 10). The company refused to do this and suit was filed in September, 1914.

XI.

January 18, 1899, the Secretary of the Interior approved a map for power-house and transmission line under the Act of May 14, 1896 (Exhibit 11).

XII.

December 28, 1904, the company relinquished the right of way previously approved July 9, 1903 (Exhibit 12).

XIII.

The Secretary approved four maps for the extension of this transmission line under the Act of February 15, 1901. The Secretary of Agriculture on October 4, 1910, issued a permit, superseding one of July 9, 1907, for a power-house site and transmission line leading from this site.

XIV.

Kern River Company also filed November 3, 1898, a map for right of way under the Act of March 3, 1891, relating to a reservoir and ditch in Twps. 23 and 24 S., R. 34 E., M. D. M. (Exhibit 13). This map was approved by the Secretary of the Interior January 18, 1899. The project was not constructed and the company relinquished the right of way on April 21, 1910.

XV.

The Kern River Company on September 24, 1897, wrote a letter to the Commissioner of the General Land Office, concerning a canal and transmission line (Defendant's Exhibit "A"). Later, on November 12, 1897, the Kern River Company made an application for a right of way for a reservoir, diversion canal, construction trail, canal and two electrical transmission lines.

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XVI.

On July 29th, 1905, the Commissioner of the General Land Office addressed a letter to the Register and Receiver at Visalia (Exhibit 14):

"The company's attention is called to the fact that unless the canal as shown by the amended survey of the amended definite location is desired for the purpose of irrigation only, the application cannot be granted under the act of March 3, 1891 (26 Stats. 1095) under which it is filed, but should be filed under the act of Feb. 15, 1901 (31 Stat. 790), which grants a permission to use the right of way over the public lands for irrigation and other purposes. See 32 L. D. 452, Denver, Northwestern & Pacific Ry. Co. vs. Hydro-Electric Power Co."

This information was communicated to the Kern River Company.

XVII.

The facts set forth in paragraph I of the second amended bill are true.

XVIII.

The facts set forth in paragraph II of said bill are true.

XIX.

The facts set forth in paragraph III of said bill are true.

65 XX.

The facts set forth in paragraph IV of said bill are true.

XXI.

It is stipulated that the facts set forth in paragraph VI of said bill are true, as to the ownership by plaintiff of said land therein described, prior to the granting thereof of the right of way for defendant's canal. This is, however, not to be construed as a stipulation negativing the right of way of defendant's canal therein, or dealing with this latter question in any manner.

XXII.

The facts set forth in paragraph VIII of plaintiff's amended bill are true.

XXIII.

The facts set forth in paragraph IX of said bill are true.

XXIV.

The facts set forth in paragraph X of said bill are true.

XXV.

The facts set forth in paragraph XIII of said bill are true.

XXVI.

The facts set forth in paragraph XIV of said bill are true, but this shall not be construed as a stipulation that defendant did or did not obtain a right of way through said land therein described. It is further stipulated that said land described in said paragraph XIV was also open and subject to the provisions of Section 2
66 of the Act of Congress approved May 11, 1898, entitled: "An Act to amend an Act to permit the use of a right of way through public lands for tramroads, canals and reservoirs, and for other purposes."

It is further stipulated that defendant has never used said canal for the purpose of irrigation, but has ever used, and now uses, the same solely for the purpose of carrying water to be used to generate electric power, which the said company sells mainly for the purpose of furnishing motor power to certain electric railway systems in and around certain municipalities in said southern division of the south-

ern district of the State of California, and for supplying light for different municipalities throughout said southern district of California and that a part of the electricity generated by the said company is being sold by the said company to farmers and ranchers along the line of the electric power distributing system of said defendant, which said power is used for the purpose of pumping water to be, and which is, used for irrigating land.

It is further stipulated that the amount and percentage of said electrical power used for pumping water for irrigation purposes may be shown at the trial by either party.

XXVII.

That the facts set forth in paragraph XIX of plaintiff's amended bill are true.

XXVIII.

It is further stipulated and agreed that the exhibits set forth in defendant's answer to plaintiff's second amended bill, lettered respectively "A," "B," "C," "D," "E," "F" and "G," are
67 what they purport to be, and true copies of genuine letters and documents signed or issued by the parties purporting to sign or issue said letters or documents, but that if on comparison with the said originals any error or errors are discovered either party has the right hereunder to insist on said errors being corrected.

XXIX.

It is further stipulated that the facts set forth in paragraph V of the separate and second defense of the answer of defendant, of its answer herein, are true.

XXX.

It is further stipulated that the facts set forth in paragraph V-a of the said second defense of defendant's answer, are true with the exception of the statement reading as follows: "after full consideration by the Department of the question respecting the use of the right of way of the canal for uses other than irrigation," but that as to the truth of this latter allegation quoted from said paragraph, no stipulation is intended to be made, said question being reserved to both parties and to inferences and conclusions from other facts admitted.

XXXI.

That the facts set forth in paragraph VI, of second defense, of defendant's answer to the second amended bill are true.

XXXII.

That the facts set forth in paragraph VIII, of second defense, of defendant's said answer shall be dealt with at the trial as follows:

68 As to the first clause of said paragraph, it shall depend on inferences to be drawn from the facts in the cause; and as to the second clause of said paragraph VIII, defendant may introduce at the trial evidence to prove the intent alleged in said second clause of said paragraph.

XXXIII.

The Kern River Company has been succeeded by the Pacific Light & Power Company, and this latter company has been succeeded by the Southern California Edison Company. Any decree rendered in this case shall be binding upon the Pacific Light & Power Company and the Southern California Edison Company as to the property in this cause involved.

XXXIV.

That said cause may be set for trial at the early convenience of Court and counsel; and that the briefs heretofore filed herein may be considered by the Court on the final submission of said cause for decision.

XXXV.

That copies of the documents and maps herein referred to may be used instead of the originals or certified copies thereof, but each and all subject to any necessary corrections by the originals or duly certified copies.

ROBERT O'CONNER,
United States Attorney.
H. P. DECHANT,
Assistant to the Solicitor, Department of Agriculture.
GIBSON, DUNN & CRUTCHER,
Solicitors for Defendant.

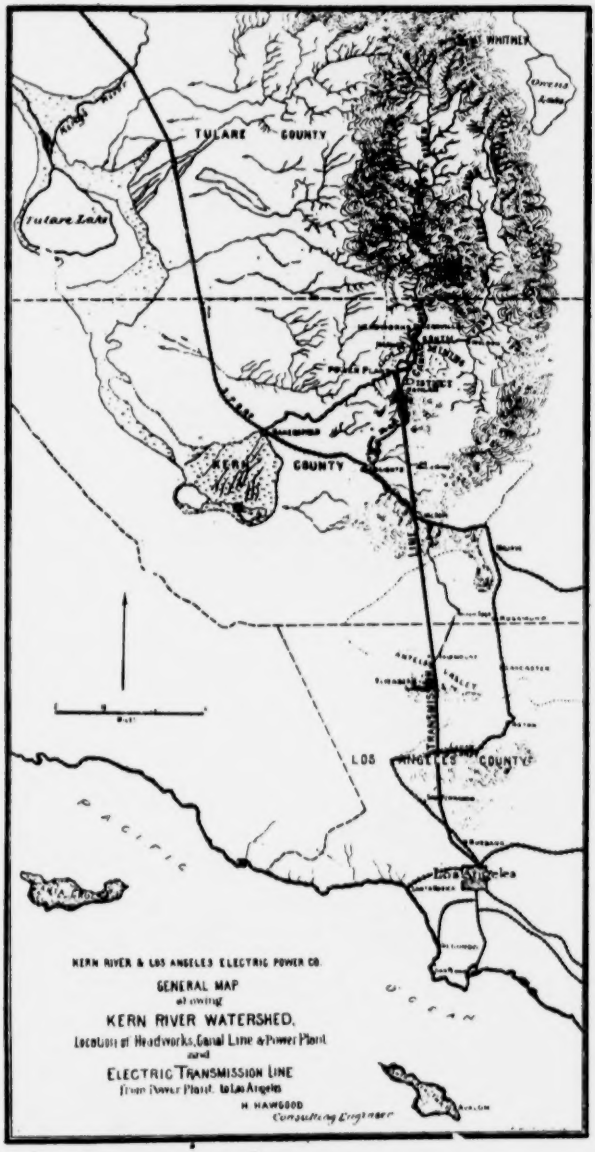
69 Dated: September 19, 1918.

In connection with said stipulation the following exhibits were filed:

Representative Examples of Water Appropriation Notices from Exhibit 2.

STATE OF CALIFORNIA,
County of Kern, ss:

All persons are hereby notified that I have located, and that I claim Twenty-five thousand miner's inches of water (Seven hundred



Kern River Co.
v.
W. S. Lates

cubic feet per second), unappropriated and flowing in Kern River measured under four inch pressure at the point where this notice is posted, which is the point of divi-sion (see note below) the purpose for which said water is claimed is for irrigation and water power for the operation of machinery for producing electricity and for other useful purposes, at a point on the Kern River near the center of section fifteen (15) township twenty-seven (27), south of range thirty-two (32) east, Mount Diablo Meridian, and at drops in the Canal; and that I intend to divert said water by means of dams and excavations and said water will be conveyed from the point of divi-sion by means of canals, flumes, ditches, pipes, tunnels, or aqueducts at different points along the line, as the circumstances may require, sixty feet wide and five feet deep, and of sufficient size to conduct said water to the point of use.

The place where this notice is posted is on said River in section thirty-three (33), township twenty-five (25) S., range thirty-
70 three (33) east, Mount Diablo Meridian, adjoining the townsite of Kernville on the east, County of Kern as aforesaid.

J. W. EDDY.

Witness-:
C. J. E. TAYLOR.
STEPHEN BARTON.

Dated October 18th, 1894.

(NOTE.)—This diversion is from the main, into the West Channel, and the water will be further diverted from the West Channel into a canal at a point about eighty rods lower down the river.

(Here follows map marked pages 71 and 72.)

73 I hereby certify the foregoing to be a full true and correct copy of the original filed for record at the request of J. W. Eddy, October 24th, 1894 at 9:55 A. M.

T. A. WELLS,
Register of Deeds.

STATE OF CALIFORNIA,
County of Kern, ss:

All persons are hereby notified that I have located and that I claim Thirty-five thousand Miner's Inches of water (seven hundred cubic feet per second), unappropriated and flowing in Kern River, measured under four inch pressure, at the point where this notice is posted, which is the point of diversion. The purpose for which said water is claimed is for irrigation and water power for the operation of machinery for producing Electricity, Manufacturing, Mining, and other useful purposes, at a point in the Kern River near the mouth of Clear Creek, Section fifteen (15), township Twenty-seven (27) South, of Range thirty-two (32) east, M. D. M., and at drops on falls in the canal or race where the power can be economically and conveniently used; and that I intend to divert said water by means of dams and excavations, and said water will be conveyed from the point of diversion by means of canals, flumes, ditches, races, pipes, tunnels or aqueducts at different points along the line as the circumstances and conditions may require, Sixty feet wide and five feet deep, or of sufficient size to conduct said water to the point of use.

74 The place where this notice is posted is on the East bank of Kern River opposite the Townsite of Kernville, section thirty three (33) Township twenty-five (25) south, range thirty-three (33) East, M. D. M.

Dated December 23, 1894.

E. H. GALE.

Witness:
E. H. JONES.

Notice of the Kern River & Los Angeles Elec. Power Co. of Appropriation of Water.

All persons are hereby notified that the Kern River & Los Angeles Electric Power Company, a corporation organized under the laws of the Territory of Arizona, has located and hereby claims thirty-five thousand (35,000) miner's inches of water measured under four (4) inches, pressure (700 cubic feet per second) unappropriated and flowing in Kern River at the point where this notice is posted * * * which is the point of intended diversion. * * *

It is intended to divert this water from the main channel of Kern River into a Canal. The purposes for which said water is claimed are for irrigation and for the purpose of acquiring water power for the operation of machinery, for generating electricity — for other useful purposes. * * *

The places of intended use are a point on or near the Kern

River near section thirty-three (33), township twenty-seven (27), South of range thirty-one (31), east, Mt. Diablo Meridian, and at drops in the canal. * * *

The above Corporation intends to divert said water by means of dams and excavations and said water shall be conveyed from the point of intended diversion by means of canals, flumes, ditches, pipes and tunnels, and aqueducts, at different points along
75 the line as circumstances may require, sixty (60) feet wide and five feet deep and of sufficient size to conduct said water to the point of intended use. * * *

This notice is posted on Kern River near the point where said River crosses the south line of section seventeen (17), township twenty-seven (27) south of range thirty-two (32) east Mr. Diablo Meridian in the County of Kern, State of California.

Dated June 20, 1895.

THE KERN RIVER & LOS ANGELES ELECTRIC POWER CO.
JOHN CROSS, *First Vice-President.*

Witness:
L. J. C. SPRUANCE,
Secretary.

I hereby certify the foregoing to be a full, true and correct copy of the original filed for record at the request of Wells, Fargo & Co., June 29th, 1895, at 9:03 A. M.

F. S. BENSON,
Recorder.

Representative Examples of Water Appropriation Notices from Exhibit 3.

Notice of Appropriation.

Notice is hereby given that the Kern River Company, a corporation organized and existing under and by virtue of the laws of the State of Maine, has located and appropriated and hereby claims eight hundred (800) cubic feet per second of water unappropriated and flowing in Kern River, in the County of Kern, State of Cali-
76 fornia, at the point where said notice is posted, being on the East bank of said Kern river opposite the townsite of Kernville, in said county, in section thirty-three (33), township twenty-five (25) south, range thirty-three (33) east, M. D. M., which last named point is hereby designated and named as the point of intended diversion of said eight hundred (800) cubic feet per second of water;

That the purposes for which said water is appropriated are for irrigation, generation of power, and other useful and beneficial purposes; that said water hereby appropriated is to be carried and conveyed from said point of diversion for about three quarters (¾) of a mile in a canal about sixty (60) feet wide and about nine (9) feet deep; and thence for a distance of between eleven (11) and twelve

(12) miles in a canal about twenty-five (25) feet wide at the bottom, and about forty-five (45) feet wide at the top and about nine (9) feet in depth, with flumes and other necessary works, to the places of intended use, which are at this point, and at various other points of said canal where said water is to be diverted and used for purposes of irrigation and other useful purposes, and also at a point near the north line of section fifteen (15), township twenty-seven (27) south, range thirty-two (32) east, M. D. M. This notice is posted at a point on the west bank of the Kern River near Green street in the town of Kernville.

KERN RIVER COMPANY,
By CHAS. FORMAN,
President.

Attest:
H. L. McKEE,
Secretary.

77 Witnesses:
O. G. McWAIN.
CHAS. C. TAYLOR.

Dated this the 22d day of September, 1897.
Dated this the 22d day of September, 1897.

I certify the foregoing to be a full and true copy of the original filed for record at request of Bender & Hewitt. Sep. 27th, 1897, at 10:02 A. M.

F. S. BENSON,
Recorder,
By J. W. CROSLAND,
Dep.

Notice of Appropriation.

Notice is Hereby Given: That the undersigned, G. O. Newman, does hereby claim all the water of the Kern River flowing at this intended point of diversion to the extent of 30,000 inches, measured under a four-inch pressure; said water to be diverted at a point in southwest quarter of northeast quarter of section nineteen (19), township twenty-six (26) south, range thirty-three (33) east, M. D. M., where this is posted. That the purposes for which he claims it are as follows:

For the purpose of applying the same to mechanical devices, for the purpose of developing power to be used in the generation of electricity, or for any mechanical purpose. That the place of intended use is the Southeast quarter of section ten (10), township twenty-seven (27) south, range thirty-two (32) east, M. D. M.; that the means by which he intends to divert the same are, by means of

dams, tunnels, and by means of a canal, consisting of ditches,
78 flumes, tunnels, pipes and conduit, all of the capacity and size sufficient to carry said 30,000 miner's inches of water from the intended point of diversion to the point of use thereof.

Dated March 9th, 1902.

G. O. NEWMAN,
Appropriator.

Witness:
T. M. SHAW.

I hereby certify the foregoing to be a true copy of the original filed for record at request of Bender & Hewill, March 11, 1902, at 9:25 A. M.

CHAS. A. LEE,
Recorder,
By C. S. MERONEY,
Deputy.

Notice of Appropriation.

Notice is Hereby Given: That the undersigned, H. S. Fisher does hereby claim all the water of the Kern River flowing at this intended point of diversion to the extent of one thousand inches, measured under a four-inch pressure; said water to be diverted at a point in the S. W. ¼ of the S. W. ¼ of Sec. 17, Twp. 26 S., Range 33 E., M. D. B. & M., on the right of way of the Kern River Company near where its canal or flume crosses Kern River, in the County of Kern, and State of California, where this is posted. That the purposes for which he claims it are as follows: For the purpose of applying the same to mechanical devices, for the purposes of developing power to be used in the generation of electricity, or for any mechanical purpose. That the place of intended use is
79 at power-house of the Kern River Company, now constructed in Section 10, Township 27 South, Range 32 East, M. D. B. & M., in the County of Kern, State of California; that the means by which he intends to divert the same are, by means of dams, tunnels, and by means of a canal, consisting of ditches, flumes, tunnels, pipes, pumps, and conduit, all of the capacity and size sufficient to carry one thousand miner's inches of water from the intended point of diversion, to the point of use thereof.

That the place of intended diversion and the route of intended conveyance of said water are within the limits of the Sierra Forest Reserve.

Dated July 1st, 1905.

H. S. FISHER,
Appropriator.

Witness:
FRED R. BELKNAP.

STATE OF CALIFORNIA,
County of Kern, ss:

H. S. Fisher, being duly sworn, says: That on the first day of July, 1905, I resided at Borel, in said County; that on said day and date I posted a copy of notice of appropriation, herewith attached, on a cottonwood tree near the point of diversion in the S. W. ¼ of S. W. ¼ Sec. 17, Twp. 26 S., Range 33 E., M. D. B. & M.

H. S. FISHER.

Subscribed and sworn to before me, this first day of July, 1905.
[SEAL.] CHAS. C. TAYLOR,
Notary Public.

80 Recorded at the request of Bakersfield Abstract Co., Jul. 7, 1905, at 50 min. past 8 A. M., in book 2 of Water Rights, page 350, Kern County Records.

CHAS. A. LEE,
Recorder.

EXHIBIT No. 4.

Map Filed June 3, 1898, by Kern River Company.

Certificate and notations appearing on this map are as follows:

I, Chas. Forman, do hereby certify that I am President of the Kern River Company, a corporation organized and existing under the laws of the State of Maine, that is applicant for the Right of Way for canal described on this map; that H. Hawgood who subscribed the accompanying affidavit, is the chief engineer of the said company; that the survey of the canal, as accurately represented on this map and by the accompanying field-notes, was made under the authority of the company; that the said canal as represented on this map and by said field-notes, was adopted by the company, by resolution of its board of directors on the 20th day of October, 1897, as the definite location of said canal, described as follows: the initial point of said survey being N. 28° 09 E. 2762 feet distant from the ¼ sec. corner between Secs. 33 and 4, townships 25 and 26 south, range 33 east, M. D. M.; the length of said canal being 66,400 feet and the terminal point thereof being N. 81° 12′ W. 1691 feet distant from the S. E. corner of Sec. 10, township 27 south range 32 east, M. D. M. and that no lake or lake-bed, stream, or stream-bed, is used for the said canal except as shown on this map; and that the map has
81 been prepared to be filed for the approval of the Secretary of the Interior in order that the company may obtain the benefits of Sections 18 to 21 inclusive of the Act of Congress approved March 3, 1891, entitled "An Act to repeal timber culture and for other purposes," and of section 2 of an Act of Congress approved May 11, 1898, entitled "An act to amend an act to permit the use

of the right of way through public lands for tram-roads, canals and reservoirs and for other purposes," enlarging the purposes for which right of way granted under said sections 18 to 21 of the Act of March 3, 1891, may be used. And I further certify that the right of way for such canal is desired solely for the purposes prescribed by the aforesaid acts.

(Signed) CHAS. FORMAN,
President of the Kern River Company.

Attest:
[SEAL.] (Signed) H. C. McKEE,
Secretary.

This map was first filed in this office on the 3d day of June, 1898. It was filed 3d day of November, 1898.

(Signed) S. W. AUSTIN,
Register.

A. M.

J. I. P.

Dept. of the Interior.

Apr. 14, 1899.

Approved subject to all valid existing rights.

(Signed) E. A. HITCHCOCK,
Secretary.

82 EXHIBIT No. 5.

Decree in Miller & Lux, a Corporation, et al. vs. A. Brown Co., a Corporation, et al., in Superior Court, County of Kern, State of California.

In the Superior Court, County of Kern, State of California.

MILLER & LUX, a Corporation; KERN COUNTY LAND COMPANY, a Corporation; Farmers' Canal Company, a Corporation; Pioneer Canal Company, a Corporation; Buena Vista Canal Company, a Corporation; Kern Island Irrigating Canal Company, a Corporation; James Canal Company, a Corporation; Anderson Canal Company, a Corporation; Stine Canal Company, a Corporation; Plunkett Canal Company, a Corporation; James & Dixon Canal Company, a Corporation; Joice Canal Company, a Corporation; Kern River Canal and Irrigating Company, a Corporation, and Central Canal Company, a Corporation, Plaintiffs,

vs.

A. BROWN COMPANY, a Corporation; ANDREW BROWN, JOSE CHICO, Ann Lurch, John Doe Lurch, Julia Scoopin, John Doe Scoopin, Francisco Apalata, Thomas W. Pack, Magnus Petersen, Mrs. E. L. Tibbetts, John Doe Tibbetts, H. L. Cook, C. A. Cook, J. L. Hooper, J. V. Roberts, Thomas J. Gilbert, Gabriel Luz, J. W. Summer, Joseph Cyrus, Charles B. Tibbetts, A. J. Perry,
83 William M. Orr, James Stavert, Sara Jane Stavert, John Neill, Annie Neill, Stephen Barton, Mrs. M. J. Beaty, John Doe Beaty, John Kelly, Olga Kelly, Kern River Company, a Corporation, Sued Herein as First Roe Company; Second Roe Company, C. F. Bennett, Sued Herein as A. Doe; B. Doe, C. Doe, D. Doe, E. Doe, F. Doe, G. Doe, H. Doe, I. Doe, J. Doe, K. Doe, L. Doe, M. Doe, N. Doe, O. Doe, P. Doe, Q. Doe, R. Doe, S. Doe, T. Doe, U. Doe, V. Doe, W. Doe, X. Doe, Y. Doe, and Z. Doe, Defendants.

Decree.

The defaults of Mrs. M. J. Beaty and John Doe Beaty, defendants in the above-entitled action, for failure to appear and answer the complaint of plaintiff herein after due and regular service of the summons in the action, having been duly entered herein, and the defendants, The A. Brown Company, sued herein under the name of A. Brown Company, a corporation, Andrew Brown, J. L. Hooper, James Stavert, Sara Jane Stavert, John Kelly, Olga Kelly, C. F. Bennett, sued herein as A. Doe, Lulie Bennett sued herein as B. Doe, and Kern River Company, a corporation, sued herein as First Roe Company, having duly appeared herein by their respective attorneys, and being now before the Court and consenting to a trial of the action and the entry of the within decree, and the action having been dis-

missed as against all other defendants except those herein
84 named, and a jury being expressly waived, the following contract is offered and read in evidence:

(Here follows Contract between Miller & Lux and Kern River Company introduced present case of United States vs. Kern River Company, et al., as Exhibit 6. The portions of this contract material on this appeal are as follows:)

This agreement, made and entered into the 23d day of December, 1904, by and between Miller & Lux, a corporation, Kern County Land Company, a corporation, Farmers' Canal Company, a corporation, Pioneer Canal Compny, a corporation, Buena Vista Canal Company, a corporation, Kern Island Irrigating Canal Company, a corporation, James Canal Company, a corporation, Anderson Canal Company, a corporation, Stine Canal Company, a corporation, Plunkett Canal Company, a corporation, James & Dixon Canal Company, a corporation, Joice Canal Company, a corporation, Kern River Canal and Irrigating Company, a corporation, and Central Canal Company, a corporation, the parties of the first part, hereinafter referred to as the plaintiffs, and the Kern River Company, a corporation, party of the second part;

Witnesseth, That whereas, a suit was brought in the Superior Court of the State of California, in and for the county of Kern, by Miller & Lux, et al., against the Kern River Company, et al., defendants, in which said suit a petition was filed by the Kern River Company for the removal of said cause to the United States Circuit Court of the Southern District of California, and said cause
85 was removed to said Circuit Court, and a motion has been made therein by the plaintiffs to remand the same to the Superior Court in and for the County of Kern, which motion is still pending in the United States Circuit Court; and

Whereas subsequently the said Miller & Lux, Kern County Land Company, et al., commenced a suit in the said Superior Court of the State of California, in and for the County of Kern, against the Kern River Company and others, as defendants, respecting the rights of the said several parties to the waters of Kern River, and it is now desired by the said parties that said litigation be settled for the purpose of making said settlement and in consideration thereof;

It is now agreed between the plaintiffs in said suits and the Kern River Company, one of the defendants,

Second.

For the purpose of confining the water of Kern River in one channel above, and diverting dam or weir of the Kern River Company at Green Street, Kernville, and for the purpose of preventing water from flowing into certain ditches now taking water out of said river, the Kern River Company shall perform in a thorough and workmanlike manner all the work set forth and specified in Exhibit "B" hereunto attached and made a part hereof. This work shall be done under the supervision and to the entire satisfaction of Arthur L. Adams, whose

decision on any question relating thereto shall be binding and conclusive upon the parties.

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Fourth.

After the canal is completed in the manner herein provided for and agreed, including the construction of the bulkheads in the said canal, the said Kern River Company shall turn the waters of the Kern River into the said canal to the full extent of its safe carrying capacity, if so much water shall be flowing in the said river, and it shall continuously conduct the waters of the said river through the said canal to the extent of its safe carrying capacity, provided and whenever so much water is flowing in the said Kern River. It is understood that the canal shall never be filled to such an extent as that the surface of the water shall be less than one (1) foot from the top of the cement lining. Whenever the flow of water in the river at the headworks of the Kern River Company shall not be sufficient to fill the canal to its safe carrying capacity, then all of the water flowing at that point shall be diverted into the canal. Said water shall be permitted to flow continuously through the said canal and flumes of the Kern River Company and used by it for power purposes only.

Ninth.

The Kern River Company shall, on or before the 1st day of August, 1905, install, at a point in the said Kern River at or below the junction of the North Fork with the South Fork of said river, a pumping-plant having a minimum capacity of twenty (20) cubic feet per second for the purpose of pumping the surplus water which flows down the North Fork of said Kern River into the flume

87 or canal of the Kern River Company, if any such there be, and shall from the date of installation continuously operate said plant for the purpose of pumping all the water which shall flow down the said North Fork, not exceeding — (20) cubic feet per second, except for such time as may be required for making necessary repairs, but the Kern River Company shall not be required to operate its pumping-plant whenever the said canal is carrying its full safe carrying capacity of water, nor shall it be required to pump to exceed twenty (20) cubic feet per second at any time.

Tenth.

The Kern River Company shall, within — (—) days from the date hereof, obtain such stipulations, consents or disclaimers as are necessary to enable the plaintiffs to procure against J. M. Hooper, James Stavert, Sarah Jane Stavert, Mrs. M. J. Beaty, John Kelly and Olga Kelly, defendants in the action heretofore instituted by the plaintiffs in the Superior Court in and for the County of Kern, State of California, against The A. Brown Company and others, the entry of a decree adjudging and determining that the rights of

said defendants to the water of Kern River and any right to use the same that may have been acquired by them by any means have been acquired by and are now vested in the Kern River Company, and that said defendants are not entitled to take, use, or divert any water from the North Fork of Kern river and that the Kern River Company, the grantee of said defendants, is not entitled to take or divert any water from said Kern river for any purpose what-
88 soever except the generation of power at its power-house on Kern river and except the two (2) cubic feet per second mentioned in the eleventh paragraph, and except the one-fifth (1/5) of one (1) cubic foot per second for domestic use of power house site as set forth in paragraph eleventh. The decree so to be entered shall specifically describe all the lands formerly owned by the defendants, J. M. Hooper, James Stavert, Sarah Jane Stavert, Mrs. M. J. Beaty, John Kelly, and Olga Kelly, and acquired by the Kern River Company, and shall adjudge that the rights of said defendants and the Kern River Company in and to the waters of Kern river by virtue of their ownership of said lands for all purposes except for power purposes, are subject and subordinate to the rights of the plaintiffs, and that none of the water of Kern river shall be used upon said lands for any purpose by any of the defendants or by the Kern River Company, or by the grantees of any of said parties. The decree so to be entered shall also specifically, describe all of the lands formerly owned by the defendant The A. Brown Company, which were conveyed to the Kern River Company by deed dated —, 1904, and shall adjudge that the rights of said defendants The A. Brown Company, and the Kern River Company, in and to the waters of the North Fork of Kern river, by virtue of their ownership of said lands for all purposes except for power purposes, are subject and subordinate to the rights of the plaintiffs, and that none of the waters of the North Fork of Kern river shall be used upon said lands for any purposes by the defendants, The A. Brown Company
89 or the Kern River Company, or by the grantees of said parties, and the decree shall also provide that the rights of the Kern River Company in and to the waters of Kern River, by virtue of its ownership of said lands or by virtue of its ownership of the lands of C. F. Bennett hereinafter described are likewise subject and subordinate to the rights of the plaintiffs, and that none of the waters of Kern river shall be used upon said lands for any purpose by the Kern River Company or its grantees, except as herein expressly provided; and the Kern River Company will not convey any of the lands formerly owned by any of said parties until after the entry of said decree, and any conveyance which it may make shall expressly provide that the grantee shall be bound by said decree to the same extent as if he or she or it were named as party defendant in said action in place and stead of said Kern River Company. Said decree shall provide also that neither the Kern River Company nor any of its grantees shall pump any water upon or for use upon any of the lands referred to in this agreement, in excess of one (1) cubic foot per second. Said decree shall also adjudge that the rights of

the Kern River Company in and to the waters of Kern river, by virtue of their ownership of the following described lands:

The south half of the southwest quarter, northeast quarter of southwest quarter, southeast quarter of northwest quarter, and northeast quarter of northwest quarter, also commencing at the southwest corner of the northwest quarter of the southwest quarter of section nine (9), township twenty-six (26) south, range thirty-
90 three (33) east, Mount Diablo Base and Meridian; thence north two (2) chains, east three (3) chains, north twenty-five (25) degrees thirty (30) minutes east, seven (7) chains and seventy (70) links north forty-six (46) degrees thirty (30) minutes eighteen (18) chains and forty-five (45) links to the northeast corner of the northwest quarter of the southwest quarter of said section; thence south twenty (20) chains; thence west twenty (20) chains to place of beginning; all in section — (9), township twenty-six (26) south, range thirty-three (33) east, Mount Diablo Base and Meridian, estimated to contain two hundred and thirty (230) acres, acquired by said Kern River Company by deed executed by C. F. Bennett and wife to said Company on the 29th day of May, 1902, and the water rights acquired under and by virtue of said deed are likewise subject and subordinate to the rights of the plaintiffs, and that none of the water of said river shall be used upon said lands for any purpose by the said Kern River Company or by the grantees of said Company, except as herein expressly provided.

Eleventh.

The Kern River Company agrees that all of the water of Kern River diverted by it into said canal shall be used by it solely for the purpose of generating power and that it will not divert from said river or make use of any waters from said river for any other purpose than conducting the same through said canal to its power house for the generation of power, provided, however, that it may take into and through the Neill-Stavert Ditch not to exceed
91 two (2) cubic feet per second of water, which said water is to be conducted upon what is known as the Beaty Ranch and Stavert place, and to be used for domestic purposes and for stock or irrigation on the said Beaty Ranch and Stavert place, only, and so much thereof as shall not be used for domestic purposes, stock or irrigation on said Beaty Ranch or Stavert place, shall be conducted by the Kern River Company into its said canal; and further reserving the right to use so much water as may be necessary for domestic and garden purposes, for the buildings and residences situated at what is called the Power House Site, which amount is hereby fixed at one-fifth (1/5) of one (1) cubic foot per second; and further reserving the right to pump not to exceed one (1) cubic foot per second of water upon or for use upon the lands acquired and to be acquired by the Kern River Company and referred to in this agreement.

Twelfth.

The suit brought by Miller & Lux and others against the Kern River Company and others in the Superior Court in and for the county of Kern and removed to the United States Circuit Court as hereinbefore recited, shall be dismissed without prejudice, each of the parties paying its own costs.

Twentieth.

Except at such times as may be necessary for making repairs to or cleaning the said canal, the surface of the water in said canal (not including the forebay at the Power House), shall not be allowed to fall lower than an average of three (3) feet below the top of the cement lining on the banks of said canal, the said three
92 (3) feet to be measured along the surface of the said lining at right angles to the water line and the Kern River Company shall install and maintain such bulkheads or other appliances in the canal as may be necessary to maintain the aforesaid water level. But the Kern River Company shall not, by the use of said bulkheads or otherwise, use said canal for reservoir purposes, but subject to the aforesaid obligation to maintain the said water level the water shall be allowed to flow through the said canal in a continuous stream which shall be as nearly uniform as practicable, and shall conform as nearly as practicable to the flow of the river.

Twenty-third.

The Kern River Company shall not at any time construct any reservoir for the purpose of gathering, holding or impounding any water flowing in Kern River or which may be precipitated upon the water-shed of Kern River and will not use, unless it shall previously have obtained the written consent of the plaintiffs thereto, any water which may be stored or impounded or gathered in any reservoir by any other person, nor will it, if any other person or persons shall construct a reservoir or reservoirs for said purpose, ever at any time, unless it shall have previously obtained the written consent of the plaintiffs thereto, permit any part of the plant or transmission lines constructed, owned, or operated by said Kern River Company to be used to transmit power which may be generated by use of water stored in such reservoir or reservoirs, nor will said Kern River Company, unless it shall previously obtain the written consent
93 of the plaintiffs thereto, purchase or be in any manner interested in any power so generated.

Twenty-fourth.

And there shall be entered a decree in the Superior Court of the State of California in and for the County of Kern, in the said case of Miller & Lux, et al., vs. the A. Brown Co., et al., enjoining and

restraining the Kern River Company, a defendant therein, and its agents, servants, and attorneys, and all persons claiming by, through or under it, forever enjoining and restraining them from constructing any reservoir or reservoirs for the purpose of gathering, holding, or impounding any water flowing in Kern River, or which may be precipitated upon the watershed of Kern river and also forever enjoining and restraining said Kern River Company from permitting any of the plant or transmission lines constructed, owned or operated by said Kern River Company, to be used to transmit power which may be generated by the use of water stored in any reservoir or reservoirs constructed by any other person or persons unless it shall previously obtain the written consent of the plaintiffs hereto and from purchasing or being in any manner interested in any power so generated.

And in the event any other person or persons shall construct a reservoir or reservoirs for the purpose of gathering, holding, or impounding any water flowing in Kern river, or which may be precipitated upon the watershed of Kern river, and the said Kern River Company, or its successors in interest, shall at any time take into its canal any of the water so impounded, then and in that event
94 the said plaintiffs herein shall be entitled to an injunction restraining the diversion of such water from said Kern river and into the canal of the said Kern River Company, but no injunction or restraining order shall be issued in any suit brought by the plaintiffs, or any of them, to enforce their rights in such water, or to prevent the Kern River Company, or its successors in interest, from diverting the same from Kern river without at least ten (10) days' notice to the Kern River Company, or its successors in interest, of the application for such injunction, to the end that it may have an opportunity to oppose the granting of any such injunction or restraining order.

If plaintiffs, or any of them, shall construct any such reservoir or reservoirs above the headworks of the Kern River Company, they shall not be so constructed or used as to impair or prevent the diversion or use of the said stream for power purposes by the Kern River Company as hereinabove provided.

Twenty-sixth.

This agreement and all of its provisions shall be binding upon the successors in interest of the parties hereto in any lands, water rights, other real property or interests in such real property now owned or possessed by the said parties in the county of Kern, state of California.

In witness whereof, the said respective plaintiffs, parties of the first part hereto, have caused these presents to be subscribed in duplicate and their respective corporate names and seals to be hereunto affixed by resolution of their Boards of Directors duly authorizing
95 and directing the same, and directing the Presidents and Secretaries of said respective corporations so to sign, seal, execute,

and deliver the same on behalf of said corporations and each of them, and the said defendant, the Kern River Company, a corporation, has also caused these presents to be subscribed in duplicate and its corporate name and seal to be thereunto affixed by its President and Secretary thereto duly authorized by resolution of its Board of Directors authorizing and directing the execution of the same.

MILLER & LUX,
By HENRY MILLER,
President,
[SEAL.] By DAVID BROWN,
Secretary.
KERN COUNTY LAND COMPANY,
By WILLIAM S. TEVIS,
President,
[SEAL.] By F. G. DRUM,
Secretary.
FARMERS' CANAL COMPANY,
By WILLIAM S. TEVIS,
President,
[SEAL.] By F. G. MUNZER,
Secretary.
PIONEER CANAL COMPANY,
By WILLIAM S. TEVIS,
President,
[SEAL.] By F. G. MUNZER,
Secretary.
96 BUENA VISTA CANAL COMPANY,
By WILLIAM S. TEVIS,
President,
[SEAL.] By F. G. MUNZER,
Secretary.
KERN ISLAND IRRIGATING CANAL COMPANY,
By WALTER JAMES,
President,
[SEAL.] By F. G. MUNZER,
Secretary.
ANDERSON CANAL COMPANY,
By WILLIAM S. TEVIS,
President,
[SEAL.] By F. G. MUNZER,
Secretary.
STINE CANAL COMPANY,
By WILLIAM S. TEVIS,
President,
[SEAL.] By F. G. MUNZER,
Secretary.
PLUNKETT CANAL COMPANY,
By WILLIAM S. TEVIS,
President,

[SEAL.] By F. G. MUNZER,
Secretary.
JAMES & DIXON CANAL COMPANY,
By WILLIAM S. TEVIS,
President,
[SEAL.] By F. G. MUNZER,
Secretary.
97 JOICE CANAL COMPANY,
By WILLIAM S. TEVIS,
President,
[SEAL.] By F. G. MUNZER,
Secretary.
JAMES CANAL COMPANY,
By WILLIAM S. TEVIS,
President,
[SEAL.] By F. G. MUNZER,
Secretary.
KERN RIVER CANAL AND IRRIGATING COMPANY,
By WILLIAM S. TEVIS,
President,
[SEAL.] By F. G. MUNZER,
Secretary.
CENTRAL CANAL COMPANY,
By WILLIAM S. TEVIS,
President,
[SEAL.] By F. G. MUNZER,
Secretary.
KERN RIVER COMPANY,
By CHAS. FORMAN,
President,
[SEAL.] By H. S. McKEE,
Secretary.

(Duly acknowledged by all parties.)

And findings and conclusions of law being waived and the parties further waiving all omissions or defects in the pleadings and stipulating that any and all amendments to the pleadings necessary to support this decree may be deemed to have been made
98 and consenting to the entry of this decree.

And it further appearing from such contract that the plaintiffs are entitled to injunctive relief as herein provided;

Now, therefore, it is adjudged and decreed by the Court that the defendant, the Kern River Company, and its agents, servants and attorneys, and all persons claiming by, through or under it, be and they hereby are forever enjoined and restrained from constructing any reservoir or reservoirs for the purpose of gathering, holding or impounding any water flowing in Kern River, or which may be precipitated upon the watershed of Kern River, and if any other person or persons shall construct a reservoir or reservoirs for said purpose,

ever at any time, unless it shall have previously obtained the written consent of the plaintiffs thereto, from permitting any part of the plant or transmission lines constructed, owned or operated by said Kern River Company to be used to transmit power which may be generated by the use of water stored in such reservoir or reservoirs, and unless it shall previously obtain the written consent of the plaintiffs thereto, from purchasing or being in any manner interested in any power so generated.

It is further adjudged and decreed by the Court that the defendant, Kern River Company, has acquired and is now the owner of the lands situate in the County of Kern, State of California, formerly owned by the defendants, J. L. Hooper, James Stavert, Sara Jane Stavert, Mrs. M. J. Beaty, John Kelly, Olga Kelly, C. F. Bennett, sued herein under the name of A. Doe, Lulie Bennett, sued herein as B. Doe, and The A. Brown Company, sued herein under the name of A. Brown Company, and described as follows, to wit:

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All of the southeast quarter of the northeast quarter of section thirty-three (33) lying east of the west bank of the west fork of Kern River, and the northeast quarter of southeast quarter of section thirty-three (33), township twenty-five (25) south, range thirty-three (33) east, Mount Diablo Base and Meridian.

Lot six (6), Block L, Kernville Townsite, and the south half of the southeast quarter of section thirty-three (33) township twenty-five (25) south, range thirty-three (33) east, Mount Diablo Base and Meridian.

West half of the northwest quarter, southeast quarter of the northwest quarter, and the northwest quarter of the southwest quarter of section four (4); the east half of the northeast quarter, and the south half of the southeast quarter of section five (5); the northeast quarter, and the west half of the southeast quarter of section eight (8); the east half of the northwest quarter, the southwest quarter of the northwest quarter and the southwest quarter of section nine (9), township twenty-six (26), south; range thirty-three (33) east, Mount Diablo Base and Meridian.

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The northeast quarter, the southeast quarter, and the east half of the southwest quarter of section seventeen (17), township twenty-six (26) south, range thirty-three (33) east, Mount Diablo Base and Meridian.

All that portion of the south half of the southeast quarter of section thirty (30), township twenty-six (26) south, range thirty-three (33) east, Mount Diablo Base and Meridian, lying east of the west line of the right of way of the Kern River Company's canal, as the said right of way has been surveyed by the said Kern River Company.

East half of the southeast quarter, section twenty-two (22), township twenty-five (25) south, range thirty-three (33) east.

South half of northwest quarter, section twenty-six (26), township twenty-five (25) south, range thirty-three (33) east.

Northeast quarter; north half of southeast quarter; southwest quarter of southeast quarter, and east half and the southwest quarter of

southwest quarter, section twenty-seven (27), township twenty-five (25) south, range thirty-three (33) east.

Southeast quarter of southeast quarter, section thirty-three (33), township twenty-five (25) south, range thirty-three (33) east.

West half of east half, section thirty-four (34); east half of northwest quarter, west half of northwest quarter, and southwest quarter of section thirty-four (34), township twenty-five (25), south, range thirty-three (33) east.

South half of southwest quarter, and southwest quarter of southeast quarter, section thirty-five (35), township twenty-five (25) south, range thirty-three (33) east.

101 Northeast quarter of northeast quarter, and southeast quarter of northeast quarter, section four (4), township twenty-six (26) south, range thirty-three (33) east.

That the defendant, Kern River Company, has also acquired and is now owner of the land situated in the said County of Kern, State of California, referred to in the contract hereinabove set forth, as a power-house site, and bounded and particularly described as follows, to wit:

East half of southwest quarter, and West half of southeast quarter; all of the southeast quarter of section ten (10) township twenty-seven (27) south, range thirty-two (32) east, Mount Diablo Base and Meridian.

It is further adjudged and decreed that all rights of the defendants, J. L. Hooper, James Stavert, Sara Jane Stavert, Mrs. M. J. Beaty, John Kelly, Olga Kelly, C. F. Bennett, Lulie Bennett, Andrew Brown, and The A. Brown Company, to the waters of the north fork, of the Kern River and any right to use the same that may have been acquired by them by any means, except any rights in the Town Ditch, have been acquired by and are now vested in the defendant Kern River Company, and that said Defendants, J. L. Hooper, James Stavert, Sara Jane Stavert, Mrs. M. J. Beaty, John Kelly and Olga Kelly, C. F. Bennett, Lulie Bennett, Andrew Brown and The A. Brown Company are not entitled to take, use or divert any water from the north fork of the Kern River, and are hereby forever enjoined and restrained from diverting or using any of the said

102 waters; and that the defendant Kern River Company, the grantee of said defendants, is not entitled to take or divert any water from said Kern River for any purpose whatsoever, except for the generation of power at its power-house on Kern River and except the two (2) cubic feet per second, and except also the one-fifth (1/5) of a cubic foot per second for domestic use at the power-house mentioned in the eleventh paragraph of said agreement. That the rights of the defendant, Kern River Company, in and to the waters of Kern River, by virtue of its ownership of the lands hereinbefore described, or by virtue of its ownership of any land in said Kern County, except to divert and use the same for power purposes under the conditions contained in said agreement, are subject and subordinate to the rights of the plaintiffs, and that none of the waters of Kern River shall be used upon said lands for any purpose

by the said defendant Kern River Company or its grantees, except as above provided, and the defendant Kern River Company, its officers, agents, employees, servants and attorneys, its successors, grantees and assigns, are hereby forever enjoined and restrained from diverting or using upon the said lands any of the waters of the Kern River except as provided in the eleventh paragraph of the said agreement. That neither the Kern River Company nor any of its grantees shall pump any water upon or for use upon any of the lands referred to in this decree in excess of one (1) cubic foot per second. That the said defendant Kern River Company, its officers, agents, employees, servants and attorneys, its successors,
103 grantees and assigns, are hereby forever enjoined and restrained from pumping any water upon or for use upon any of the lands referred to in this decree in excess of one (1) cubic foot per second.

It is further adjudged and decreed that except so far as the rights of the defendant Kern River Company and the other defendants, if any, it or they have, to divert or use the waters of Kern River are by said contract and this decree expressly limited, neither said contract nor this decree shall be construed as determining or changing the rights of any of the parties to this action, if any they have, to divert or use the waters of said Kern River, or as subordinating the rights of any of the said parties therein, if any they have, to the rights of any other parties.

Nothing in this decree contained shall in any manner affect any rights which the defendant, A. Brown or The A. Brown Company, or any other defendant has, or may have in the ditch known as the "Town Ditch" which takes water from the North Fork of the Kern River above the Town of Kernville, nor be deemed in any way to prohibit them or any of them from taking or using water through said ditch from the North Fork of the Kern River according to their respective rights, nor shall such taking or using of water be a violation of the injunction in this decree provided for. This decree is not to be construed as an adjudication as to such rights as to their existence or nonexistence.

This decree shall not be construed as an adjudication
104 against Andrew Brown or The A. Brown Company as to the ownership of any land other than the following:

In Township 25 S., R. 33 E., M. D. B. & M. Section 22: East ½ of Southeast Quarter.

Section 26: South half of Northwest Quarter.

Section 27: North half and Southwest Quarter of Southeast Quarter and East half of Southwest Quarter and Northeast Quarter.

Section 33: Southeast Quarter of Southeast Quarter.

Section 34: West half of Northeast Quarter and East half of Northwest quarter; and West half of Southeast Quarter and Southwest Quarter.

Sec. 35: Southwest quarter of Southeast Quarter and South half of Southwest Quarter.

In Township 26 S., R. 33 E., M. D. B. & M.

In Section Four; Southeast Quarter of Northeast Quarter and Northeast Quarter of Northeast Quarter.

J. W. MAHON,
Judge.

Done in open court this 29th day of December, 1904.

EXHIBIT No. 7.

Map Filed January 19, 1905, by Kern River Company.

Certificates and notations appearing on this map are as follows:

I, Chas. Forman, do hereby certify that I am the President of the Kern River Company; that the canal described as follows: The initial point of said survey being North 27° 43′ East, 3006.5 feet
105 distant from the quarter section corner of Sections 33 and 4, Townships 25 and 26 South, Range 33 East, M. D. M., the length of said canal being 63,019.7 feet, and the terminal point thereof being North 89° 20′ West, 1087.3 feet distant from the southeast corner of Section 10, Township 27 South, Range 32 East, M. D. M., was actually constructed as set forth in the accompanying affidavit of G. O. Newman, Chief Engineer, on the exact location represented on the map and by the field-notes approved by the Secretary of the Interior on the 14th day of April, 1899, except in so far as the route indicated upon the present map of the Amended Definite Location differs therefrom; that the company has in all things complied with the Act of Congress of March 3d, 1891, granting the rights for canals, ditches, etc., through the public lands of the United States.

(Signed) CHAS. FORMAN,
President of Kern River Company.

Attest:
H. S. McKEE,
Secretary.

I, Chas. Forman, do hereby certify that I am President of the Kern River Company; that G. O. Newman, who subscribed the accompanying affidavit, is the chief engineer of said company; that the amended survey of the said amended definite location of the said canal, as accurately represented on this map and by the accompanying field-notes, was made under authority of the company; that the company is duly authorized by its Articles of Incorporation to construct the said canal upon the location shown upon
106 this map; that the said canal as represented on this map and by said field-notes was adopted by the company by resolution of its board of directors on the 23d day of Jan., 1905, as the amended definite location of said canal, described as follows: The initial point of said survey being N. 27° 43′ E., 3006.5 feet distant from the quarter section corner of Sections 33 and 4, Townships 25 and 26 South, Range 33 East, M. D. M., the length of said canal being 63,019.7 feet, and the terminal point thereof being N. 89° 20′

W., 1087.3 feet distant from the Southeast corner of Section 10, Township 27 South, Range 32 East, M. D. M.; and that no lake or lake-bed, stream or stream-bed, is used for the said canal except as shown upon this map; and that the map has been prepared to be filed for the approval of the Secretary of the Interior, in order that the company may obtain the benefits of Sections 18 to 21, inclusive, of the Act of Congress approved March 3, 1891, entitled "An Act to repeal timber culture laws, and for other purposes," and Section 2 of the Act approved May 11, 1898; and I further certify that the right of way herein described is desired for public purposes.

(Signed) CHAS. FORMAN,
President Kern River Company.

Attest:
H. S. McKEE,
Secretary.

U. S. Land Office,

Independence, Cal., Jan. 19, 1905.

I hereby certify that this map was filed this 19th day of January, 1905 and that vacant public land is affected by the proposed
107 right of way.

(Signed) S. W. AUSTIN,
Register.

U. S. Land Office,

Visalia, Cal.

Refiled September 2, 1905.

GEO. W. STEWART,
Register.

J. I. P. A. M.

Dept. of the Interior.

Nov. 27, 1905.

Approved subject to all valid existing rights.

(Signed) E. A. HITCHCOCK,
Secretary.

Before refiling Sept. 2, 1905, the second certificate above noted was put on the map.

EXHIBIT No. 8.

Department of Agriculture.

Office of the Secretary.

Washington, D. C., March 12, 1908.

Kern River
Co. Canal.
(Interior, Act)
(March, 3, 1891)
9/2/05-Sierra (South.)

1176

Division of Mails & Files.
Received Mar. 16, 1908.
To Gen'l Land Office,
Dept. of the Interior,
Div'n of Mails and Files.
Prepare reply Mar. 16,
1908, for Secretary's
signature

108 The Honorable Secretary of the Interior.

SIR:

On November 27, 1905, Secretary of the Interior Hitchcock approved the map filed by the Company in this case January 19, 1905, in the United States Land Office at Independence, California.

In my letter to you dated June 14, 1907, in the case of the Sierra Ditch and Water Company I informed you that this Department would report to you upon several rights of way in National Forest in California, the maps of which were approved in your Department under the Act of March 3, 1891, upon the certification by the applicants that the rights of way were sought for the main purpose of irrigation, while they are in fact used solely for generating electric power, with no pretense of a use for irrigation.

An investigation by the Forest Service of the Kern River Company's right of way discloses the fact that the right of way is used solely for power purposes, and that many years before the Company filed its maps in your Department the entire flow of Kern River below the Kern River Company's canal was appropriated by other parties for irrigation, and that the Kern River Company is now compelled by a permanent court decree to make no permanent diversion of any water from the Kern River, and the Kern River Company has no right to the use of the water except for power purposes.

In view of these facts I respectfully recommend that you revoke the approval of the Kern River Company's map. I assume that since the right of way has not been and could not be, used by the applicant for the main purpose of irrigation, that the Company simply
109 did not come within the grant of March 3, 1891, and that since the Secretary of the Interior could not give the Company any right to which it was not entitled under the grant, the approval of the maps by Secretary Hitchcock may properly be considered by you as having no legal effect.

I shall be glad to give you a report in this matter, more in detail, if you so desire.

Very respectfully,

JAMES M. WILSON,
Secretary.

EXHIBIT No. 10.

In reply please refer to C. & R. File No. 41. "F" WPJ. CAO. WRJ.
"F."

Department of the Interior.

General Land Office.

Washington, November 18, 1909.

Address only the Commissioner of the General Land Office.

Kern River Company Right of Way.

Messrs. Britton and Gray,
Attorneys for Kern River Co.,
Glover Building,
Washington, D. C.

SIRS:

I herewith inclose copy of departmental decision of the 12th instant, in the above-entitled case and have to advise you as attorneys for the company that it will be allowed sixty days within which to proceed in accordance therewith, failing in which, the case
110 will be prepared for submission to the Department of Justice as directed therein.

Very respectfully,

S. V. PROUDFIT,
Assistant Commissioner.

A. C. Balch testified on behalf of the defendant, which testimony in narrative form is in words and figures as follows:

Testimony of A. C. Balch for Defendant.

(Title of Court and Cause.)

A. C. BALCH, a witness called in behalf of the defendant, testified as follows:

He was an electrical engineer by profession and had been general manager of the Kern River Company from a time prior to the construction of the Canal until he ceased his connection with the Pacific Light and Power Co. (which owned the Kern River Co.) some time in 1913 or 1914. Construction was concluded about December 13,

1904. He first became connected with the defendant company in 1901. The Kern River and Los Angeles Electric Co. (the first company) was succeeded by the Kern River Co. He and two others who owned the Pacific Light and Power Co. bought the stock of the Kern River Co. They had to acquire various water rights like the Stavert canal, some rights from A. Brown, and some other rights down in Hot Springs Valley that were interfered with. It was the intention to use part of the water for irrigation purposes in Hot Springs Valley, through which the canal ran, and a part of it
111 just below Kernville through the Beatty Ranch and Stavert property, which had been acquired. They expected to show a saving in water by confining it in a canal, the same as on the San Gabriel River, and thus be able to acquire a 10% interest in the flow of the Kern River from the irrigators below, finally being able to sell this water below the mouth of the Kern River in the valley. They had these things in mind so far as the irrigation part of it went until Miller and Lux and others enjoined the diversion of the water from Kern River. By "below" he meant in the San Joaquin Valley around Bakersfield after the river debouches into the valley. The agreement (Plaintiff's Ex. 6) was the compromise agreement with Miller and Lux. The map (Defendant's Ex. "A") was prepared under his direction and the lands acquired were shown in red. He bought riparian rights as well as irrigation rights. The distance from the power-house (about 12 miles below Kernville) to the point where the river debouches into the valley, is about 16 or 17 miles. The stream is practically confined in a box canyon for this distance. The object of acquiring the lands shown in red on Defendant's Exhibit "A" was to acquire all conflicting interests, such as riparian rights, ditch rights, etc., that might interfere with the project, from the intake to the power-house site in order to avoid subsequent litigation. Down below the power-house site the company had in mind no lands to be irrigated. They did not expect to use it that way. In the case of the San Gabriel, they had the water right and they disposed of the water right to anybody who was willing to buy
112 it. In that case they disposed of it to the Covina Irrigating Co. for about $70,000. The Kern River case was a very much larger proposition and worth much more money:

Q. Then the object of the company was not to sell water, but to sell the water right?

A. No; we were expecting to sell water. There is a very large valley here known as the Hot Springs Valley; there are some very fine lands there susceptible to irrigation.

Q. That is, if it did not interfere with your use for power?

A. All of the water taken out from above there that was not necessary for power——

Q. You were going to probably use it for irrigation in the event you had not been restrained from doing so at that time when it would not interfere with your power project?

A. Yes; at the time of the year when there is plenty of water for power purposes there is more water than we need for power that can be used for irrigating.

The power-house tract comprised 40 acres and the diversion was made in the middle of the town of Kernville. The Brown land was bought because they had to control the irrigation, otherwise Brown would take the water out and use it when they wanted it. They were not going to need it when he wanted it for irrigation. There would be water in May, June and July, when the stream was in flood, to irrigate this land and all of this land during those months, a very valuable water right that could have been used but for the in-
113 terference of the people below. These same lands could not have been irrigated without the Kern River Co. canal, not the land in Hot Springs Valley because it was 60 or 70 feet and more above the river. Prior to the construction of the canal and the filing of these suits by Miller and Lux and others, Kern River Co. did not enter into any contracts for the furnishing of water for irrigation purposes with people in Hot Springs Valley. The Pacific Light & Power Co. acquired the stock control of Kern River Co. in 1901. The Pacific Light & Power Co. furnished money to Kern River Co. to begin operations, the latter being the actual construction company. Kern River Co. never issued any bonds for construction purposes, the Pacific Light & Power Co. issuing bonds and using the proceeds in financing construction of the conduit by Kern River Co. The Pacific Light & Power Co. entered into the project because it was able through a contract to deliver power to the electric railways in Los Angeles. He was director and general manager of the Pacific Light & Power Co. for a long time, also of the Pacific Light & Power Corporation, which succeeded the Pacific Light & Power Co. He was aware of the difficulties the Kern River Co. was having with the Department of the Interior in 1907, 1908 and 1909, in connection with the use for power instead of irrigation, and he prepared a history of the whole case for Judge Short and Britton & Gray, to be submitted to the Department of the Interior.

In connection with the foregoing testimony Defendant's
114 Exhibit "A" was filed and consisted of a map which shows an aggregate area of 3040 acres of land by or through which the said Kern River flows which land was purchased as stated by A. C. Balch.

In connection with and following A. C. Balch's testimony defendant submitted the following statement of power sold and used for pumping water for irrigation of land and same was thereupon filed.

Memorandum.

UNITED STATES

v.

KERN RIVER COMPANY.

The percentage of power used for pumping water for irrigation, based on figures already in evidence, is set forth hereunder:

Years.	K. W. hrs.	% of power used for irrigation.
1909	2,408,776	5.7
1910	3,743,776	7.6
1911	4,236,266	8.9
1912	7,354,799	21.3
1913	10,661,549	27.1

Thereafter and at the end of said trial on November 22, 1918, counsel for the plaintiff, with the consent of counsel for defendant, moved said Court to amend the second amended bill making the Pacific Light and Power Corporation and Southern California Edison Company parties defendant. The Court thereupon entered an order allowing said amendment which was filed November 29, 1918, in words and figures as follows:

115 *Amendment to Second Amended Bill of Complaint.*

(Title of Court and Cause.)

To the Honorable Oscar A. Trippet, Judge of said Court:

Comes now the plaintiff herein, by the Attorney General, and by leave of Court amends the bill as follows:

The caption of the bill to read as stated in the caption of this amendment by inserting after the words "Kern River Company, a Corporation," the words "Pacific Light and Power Corporation, Southern California Edison Company," and adding the letter "s" to the word defendant:

After the words "Kern River Company, a corporation," in the preamble, page one of the bill, insert the words "Pacific Light and Power Corporation, a corporation, and Southern California Edison Company, a corporation."

After paragraph XIX of the bill and preceding the prayer, insert the words and figures:

XX.

"That the Pacific Light and Power Corporation is a corporation organized and existing under and by virtue of the laws of the State of California with its principal place of business in Los Angeles, within the State and Southern District of California."

XXI.

"That the Southern California Edison Company is a corporation organized and existing under and by virtue of the laws of the
116 State of California with its principal place of business in Los Angeles, within the State and Southern District of California."

XXII.

"That the Pacific Light and Power Corporation and Southern California Edison Company have acquired an interest in the property described herein."

The last of the prayer of the bill reading as follows:

"acquired by said defendant by virtue of the proceedings set forth herein, and forever quieting and confirming in plaintiff the title to said lands, as against any claim of right, title or interest to or in the same or any part thereof by virtue of said proceedings by said defendant, or anyone claiming under it, and enjoining said defendant from thereafter using said right of way so obtained until it has made application for the same and received the approval of the Secretary of the Interior under the said Act of February 15, 1901, and for such other and further relief as to the Court may seem just and equitable."

be amended to read as follows:

"acquired by said defendant, Kern River Company by virtue of the proceedings set forth herein, and forever quieting and confirming in plaintiff the title to said lands, as against any claim of right, title or interest to or in the same or any part thereof by virtue of said proceedings, by said defendants, Kern River Company Pacific
117 Light and Power Corporation and Southern California Edison Company, or anyone claiming under it, and enjoining said defendants, Kern River Company, Pacific Light and Power Corporation and Southern California Edison Company from thereafter using said right of way so obtained until it has made application for the same and received the approval of the Secretary of the Interior under the said Act of February 15, 1901, and for such other and further relief as to the Court may seem just and equitable."

THOMAS WATT GREGORY,
Attorney General of the United States;
ROBERT O'CONNOR,
United States Attorney;
CLYDE R. MOODY,
Assistant United States Attorney;
H. P. DECHANT, *Attorneys for Plaintiff.*

"It is hereby stipulated and agreed that the above and foregoing is a correct statement of the case in the above cause, and that it shows how all questions involved in said cause arose and that it contains all the facts alleged and proved that are essential to a decision of such questions by the Circuit Court of Appeals of the United States for the Ninth Circuit.

"Dated Oct. 2d, 1919.

ROBERT O'CONNOR,
H. P. DECHANT,
Attorneys for Plaintiff and Appellant.
GIBSON, DUNN & CRUTCHER,
Attorneys for Defendant and Respondent.

"Approved and allowed as a stipulated statement of the case on appeal, and certified to be correct, this 3d day of October, 1919.

OSCAR A. TRIPPET,
District Judge."

118 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3406.

THE UNITED STATES OF AMERICA, Appellant,

vs.

KERN RIVER COMPANY, a Corporation; PACIFIC LIGHT AND POWER Corporation, and Southern California Edison Company, Appellees.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

119 At a Stated Term, to wit, the October Term, A. D. 1919, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-room Thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the Third Day of February, in the Year of Our Lord One Thousand Nine Hundred and Twenty.

Present: The Honorable William B. Gilbert, Senior Circuit Judge, Presiding; Honorable William H. Hunt, Circuit Judge; Honorable Frank H. Rudkin, District Judge.

No. 3406.

THE UNITED STATES OF AMERICA, Appellant,

vs.

KERN RIVER COMPANY, a Corporation; PACIFIC LIGHT AND POWER Corporation, and Southern California Edison Company, Appellees.

Order of Submission.

Ordered appeal in the above-entitled cause argued by Mr. H. Dechant, Assistant to Solicitor, Department of Agriculture, counsel for the appellant, and by Mr. James A. Gibson, counsel for the appellees, and submitted to the Court for consideration and decision.

120 At a Stated Term, to wit, the October Term, A. D. 1919, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-room Thereof, in the City and County of San Francisco, in the State of California, on Monday, the Fifth Day of April, in the Year of Our Lord One Thousand Nine Hundred and Twenty.

Present: The Honorable William W. Morrow, Circuit Judge Presiding; Honorable William H. Hunt, Circuit Judge.

In the Matter of the Filing of Certain Opinions and of the Filing and Recording of Certain Judgments and Decrees.

By direction of the Honorable William B. Gilbert, William H. Hunt, Circuit Judges, and the Honorable Frank H. Rudkin, District Judge, before whom the causes were heard, Ordered that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the Clerk, and that a Judgment or Decree be filed and recorded in the Minutes of this Court in each of the causes in accordance with the opinion filed therein:

No. 3406.

THE UNITED STATES OF AMERICA, Appellant,

vs.

KERN RIVER COMPANY, a Corporation; PACIFIC LIGHT AND POWER Corporation, and Southern California Edison Company, Appellees.

* * * * * * *

121 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3406.

THE UNITED STATES OF AMERICA, Appellant,

vs.

KERN RIVER COMPANY, a Corporation; PACIFIC LIGHT & POWER Corporation, and Southern California Edison Company, Appellees.

(Opinion U. S. Circuit Court of Appeals.)

Section 18 of the Act of March 3, 1891 (26 Stat. 1095), provides:

"That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation, and duly organized under the laws of any State or Territory, which shall have filed or may

hereafter file with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: Provided, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories."

Section 19 provides:

"That any canal or ditch company desiring to secure the benefits of this act, shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way."

122 This act was amended by the Act of May 11, 1898 (30 Stat. 404), and as amended provides that the rights of way thus acquired "may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power as subsidiary to the main purpose of irrigation."

The Kern River Company is a corporation organized under the laws of the State of Maine, for the purpose of carrying on the business of building, constructing, maintaining and operating canals, ditches, reservoirs, dams, flumes, aqueducts, pipes and pipe lines for carrying storing and supplying water for the purpose of irrigation, for the transmission of power, and for other purposes not material here. The Company filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization, and the maps provided for by the act and the regulations applicable thereto, and made application for a right of way over the Sequoia National Forest in the State of California. On the 12th day of November, 1897, the Commissioner of the General Land Office, in a letter to the register and receiver at Visalia, California, called attention to the fact that "The two Acts of March 3, 1891, and May 14, 1896, are so different in the character of estates or permissions therein provided for, as well as in the use to which the rights of way may be devoted and the extent of such rights of way, that no permission or grant can be sanctioned which is based on the two acts."

Citing H. W. O'Melveny, 24 L. D. 560.

It may be here stated that the Act of May 14, 1896, provides:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under the general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty
123 acres, upon the public lands and forest reservations of the United States, by any citizen or association of citizens of the United States, for the purposes of generating, manufacturing, or distributing electric power."

The application for the right of way was accompanied by the certificate of the president and secretary of the Kern River Company, certifying among other things that the maps had been prepared for the approval of the Secretary of the Interior in order that the Company might obtain the benefit of Sections 18 to 21, inclusive, of the Act of Congress approved March 3, 1891, entitled "An Act to repeal timber culture laws and for other purposes," and Section Two of the Act of May 11, 1898, entitled "An Act to amend an Act to permit the use of rights of way through public lands for tramroads, canals and reservoirs, and for other purposes," and further certifying that the right of way for said canal was desired solely for the purposes provided by the aforesaid acts. On the 14th day of April, 1899, the Secretary of the Interior approved the maps and location as required by law, subject to all valid existing rights. The Kern River Company thereafter constructed its canal and powerhouse, transmission lines, and so forth, at a cost of approximately three million dollars. Some time prior to the 19th day of January, 1905, the Company filed an application with the Secretary of the Interior to amend its original maps and location to conform to the line of the ditch or canal as constructed. Again the acting Commissioner of the General Land Office, in a letter to the register and receiver at Visalia, said:

"The Company's attention is called to the fact that unless the canal as shown by the amended survey of the amended definite location is desired for the purpose of irrigation only the application cannot be granted under the Act of March 3, 1891, (26 Stat. 1095), under which it was filed, but should be filed, under the Act of February 15, 1901, (31 Stat. 790), which grants permission to use the right of way over the public lands for irrigation and other purposes."

124 Citing Denver, Northwestern & Pacific Ry. Co. v. Hydroelectric Power Company, 32 L. D. 452.

In support of this application the president and secretary of the Kern River Company certified as before that the approval of the Secretary of the Interior was sought "in order that the Company might obtain the benefits of Sections 18 to 21, inclusive, of the Act of Congress approved March 3, 1891, entitled 'An Act to repeal timber culture laws, and for other purposes,' and Section 2 of the Act of Congress approved May 11, 1898, and that the right of way described on said map was desired for public purposes." On the 27th

day of November, 1905, the amended application was approved by the Secretary of the Interior, subject to all valid existing rights. On the 27th day of March, 1908, by direction of the Secretary of the Interior, notice was served upon the Kern River Company to show cause within ninety days from date of such notice why proceedings should not be instituted to cancel the grant of the right of way on the ground that the same was procured by the approval of said maps for the main purpose of irrigation, but was in fact used solely for power purposes. In response to this notice the Company made answer, and on the 18th day of November, 1909, the acting Commissioner of the General Land Office served notice on the Company that it would be given sixty days within which to further amend its amended application for a right of way, so as to bring the case within the provisions of the Act of February 15, 1901, and providing that such amended application should be accompanied by a proper relinquishment of all rights and interest acquired under the approvals given under the Act of 1891. With this request the Company failed and refused to comply.

It was stipulated among other things that the Kern River and Los Angeles Electric Power Company was organized as a corporation under the laws of the State of Arizona on May 18, 1895, and
125 that the object of the project was as follows:

"The intent and object of the enterprise is to use the flow of the north fork of Kern River for the generation of electrical energy, and to convey and sell the same to various consumers as far as Los Angeles. It is probably that eighty per cent of the total power generated would go to that city. The remaining twenty per cent being disposed of to the mining, milling and agricultural interests embraced in the first seventy miles of the line."

This Company was succeeded by the Kern River Company upon its organization, with the same officers and the purpose was to develop the same projects. The canal constructed by the Kern River Company has never been used for the purpose of irrigation, but has been used at all times solely for the purpose of carrying water to be used to generate electric power which the company and its successors sell mainly for the purpose of furnishing motive power to electric railways in the municipalities of southern California. A small percentage of the electricity is used to pump water for irrigation from wells along the course of the power lines.

The present suit was brought by the United States to vacate and set aside the order of the secretary of the Interior approving the maps of location for the ditch or canal filed under the Act of March 3, 1891; to cancel and annul the grant of the right of way; to quiet title in the plaintiff; and to restrain the defendants from using the right of way until they have complied with the requirements of the Act of February 15, 1901, relating to the construction of ditches over forest reserves for power purposes. From a decree of dismissal the present appeal is prosecuted.

Robert O'Connor, U. S. Attorney; Milton Bryan, Assistant U. S. Attorney; and H. P. Dechant, Assistant to the Solicitor, Dept. of Agriculture, Attorneys for the Appellant.

Gibson, Dunn & Crutcher and Roy V. Reppy, Attorneys for Appellees.

Before Gilbert and Hunt, Circuit Judges, and Rudkin, District Judge.

126 RUDKIN, *District* Judge (after stating the facts as above), delivered the opinion of the court:

From the foregoing statement it seems quite apparent that the appellees are operating and maintaining a canal used solely for the purpose of generating, manufacturing and distributing electric power, over a public forest reserve of the United States, without obtaining the necessary permit from the Secretary of the Interior and without authority of law. We say this is quite apparent because under the original act of 1891 the right of way could only be obtained for purposes of irrigation, and under the amendment of 1898 the right was not extended so as to include general power purposes. For whatever construction the words "may be used for purposes of a public nature" in the latter act might receive if standing alone, these general words are limited and qualified by the specific provision "or for the development of power, as subsidiary to the main purpose of irrigation," so that it is entirely manifest that a right of way for a canal for the development of power can only be obtained under the amendment of 1898, when such development is subsidiary to the main purpose of irrigation, and no such case is presented here. Has then the Government no standing in a court of equity to prevent such usurpation? The appellees claim not, first, because a suit of this nature will not lie without express legislative authority therefor; second, because the suit is barred by Section 8 of the Act of March 3, 1891; and lastly, because this court must accept the finding of the court below that the approval of the maps and location for the canal were not obtained through fraud or mistake.

1. In answer to the first objection it is only necessary to say that this is not a suit to declare a forfeiture of a land grant for breach of condition, but the ordinary suit to set aside the approval
127 of the Secretary of the Interior on the ground of fraud and mistake, like the familiar suits prosecuted every day to set aside patents obtained by similar means. As said by the Supreme Court in Noble v. Union River Logging Company, 147 U. S. 165, in reference to a grant of a right of way for railway purposes:

"The railroad company became at once vested with the right of property in these lands, of which they can only be deprived by proceedings taken directly for that purpose. If it were made to appear that the right of way had been obtained by fraud a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained."

There is another ground upon which the jurisdiction of a court of equity may perhaps be sustained. If we should assume that the appellees acquired a right of way for a canal for irrigating purposes and for the development of power subsidiary thereto, an injunction would seem to be an appropriate remedy to prevent the continuing and threatened use of the right of way thus obtained for other and different purposes and for purposes not authorized by law.

2. Nor is the suit barred by the statute of limitations. The statute upon which the appellees rely provides:

"That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the issuance of such patents."

The term patent, when applied to a grant of public lands, has well defined meaning. Thus Section 458 of the Revised Statutes provides:

"All patents issuing from the General Land Office shall be issued in the name of the United States and be signed by the President, and countersigned by the Recorder of the General Land Office; and shall be recorded in the office, in books to be kept for the purpose."

It is a well established rule that statutes of limitations do not run against the sovereign, in the absence of some express
128 statutory provision to the contrary, and if the statute is made applicable to a class of suits only it will not be extended to other cases by implication. It was well known to Congress that grants of public lands are not always made by patent. Indeed, the grant of the right of way in question made by the same act is of that character. And had Congress intended that the bar of the statute should apply, not only to patents but to all legislative grants, it would have so provided in express terms. Again, if this be treated merely as a suit to restrain the unauthorized use or occupation of the forest reserve, the statute can have no application.

3. The rule invoked by the appellees that an appellate court will not disturb the findings of the trial court on disputed questions of fact unless it is clearly manifest that there is no substantial evidence to support them, has little or no application to a case submitted on bill and answer and an agreed statement of facts. Furthermore, there is little room for controversy over the facts in this case. It is apparent that the power company was attempting throughout to obtain a permanent right of way for a canal to be used for power purposes, under an Act of Congress which granted no such right. When the first application was made, the Commissioner of the General Land Office called attention to the two acts, the one granting a right of way for irrigation purposes, and the other for power purposes, and ruled that an application based on the two acts would not be approved. To overcome this objection, doubtless, the proper

officers of the power company certified "that the right of way for said canal was desired solely for the purposes prescribed by the aforesaid Acts," referring back to the acts of 1891 and 1898. This certificate was essentially and unqualifiedly false. When the amended application was filed attention was again called to the fact
129 that the application could not be made under the Act of March 3, 1891, unless the canal as shown by the amended survey was desired for the purposes of irrigation only. To overcome this objection the officers of the power company again certified "that the map has been prepared to be filed for the approval of the Secretary of the Interior in order that the Company might obtain the benefits of Sections 18 to 21, inclusive, of the Act of Congress approved March 3, 1891, entitled 'An Act to repeal timber culture laws, and for other purposes,' and Section 2 of the Act of Congress approved May 11, 1898, and that the right of way described on said map was desired for public purposes." This certificate, while somewhat ambiguous, was doubtless intended to and did convey to the Department the impression that the right of way was authorized by the acts referred to, and was likewise false.

For these reasons, the charge of fraud, in our opinion, is fully sustained, but if we should accept the appellees' view of the case and find that the approval of the Secretary was given with full knowledge of all the facts, it would not avail them, because in that event the Secretary simply exceeded his authority and the validity of his approval may well be challenged in a suit of this kind. Thus, in United States v. Poland, decided January 5, 1920, the Supreme Court held that patents issued for more than one hundred and sixty acres in a single body in the Territory of Alaska under soldiers' additional homestead rights, were void, notwithstanding there was no fraud and the patents issued with full knowledge of all the facts.

For the foregoing reasons, we are of opinion that the court below erred, and that the decree should be reversed, with instructions to enter a decree in favor of the United States, cancelling the orders approving the maps and location for the right of way, and en-
130 joining the appellees from further maintaining their canal on the forest reserve. The operation of the injunction should be suspended for a reasonable time, however, to enable the appellees to make application to the proper Department for such permit or right as is authorized by law.

[Endorsed:] Opinion. Filed April 5, 1920. F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk.

131 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3406.

THE UNITED STATES OF AMERICA, Appellant,

vs.

KERN RIVER COMPANY, a Corporation; PACIFIC LIGHT AND POWER Corporation, and Southern California Edison Company, Appellee-.

Decree.

Appeal from the District Court of the United States for the Southern District of California, Northern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United — for the Southern District of California, Northern Division, and was duly submitted:

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is reversed, and that this cause be and is hereby remanded to the said District Court with instructions to enter a decree in favor of the United States, cancelling the orders approving the maps and location for the right of way, and enjoining the appellees from further maintaining their canal on the forest reserve. The operation of the injunction should be suspended for a reasonable time, however, to *to* enable the appellees to make application to the proper Department for such permit or right as is authorized by law.

[Endorsed:] No. 3406. United States Circuit Court of Appeals for the Ninth Circuit. United States of America vs. Kern River Company et al. Decree. Filed and Entered April 5, 1920. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

Approved and allowed as stipulated statement of the case and bill of exceptions on the appeal, to the Supreme Court of the United States and certified to be full, true and correct, this 4th day of May, 1920.

WM. H. HUNT,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

132 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3406.

THE UNITED STATES OF AMERICA, Plaintiff and Appellee,

vs.

KERN RIVER COMPANY, a Corporation; PACIFIC LIGHT AND POWER Corporation, and Southern California Edison Company, Defendants and Appellants.

Petition for Appeal.

To the Honorable Judges of the above entitled Circuit Court:

The above named defendants feeling aggrieved by the decree rendered and entered in the above entitled cause on the 15th day of April, 1920, do hereby appeal from said decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith and they pray that their appeal be allowed and that a citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States sitting at Washington, D. C., under the rules of such court in such cases made and provided.

And your petitioners further pray that the proper order touching the security to be required of them to perfect their appeal be made, and desiring to supersede the execution of the decree petitioners here tender bond in such amount as the court may require for such purpose and pray that with the allowance of the appeal a supersedeas be issued.

Dated April 26th, 1920.

J. A. GIBSON,
GIBSON, DUNN & CRUTCHER,
Attorneys for Defendants and Appellants.

133 Due service of the foregoing petition for appeal is hereby acknowledged.

In the above entitled cause issuance of citation in appeal and service of the same are hereby waived.

Dated this twenty-sixth day of April, 1920.

ROBERT O'CONNOR,
H. P. DECHANT,
Attorneys for Complainant and Appellee.

The foregoing petition for appeal having been presented to me and after consideration thereof, it is hereby ordered that said appeal be and the same is hereby granted and allowed.

WILLIAM H. HUNT,
Judge United States Circuit Court of Appeals for the Ninth Circuit.

Dated: San Francisco, Calif., April 26, 1920.

[Endorsed:] Petition for and Order Allowing Appeal to Supreme Court U. S. Filed April 26, 1920. F. D. Monckton, Clerk.

134 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3406.

THE UNITED STATES OF AMERICA, Plaintiff and Appellee,

vs.

KERN RIVER COMPANY, a Corporation; PACIFIC LIGHT AND POWER Corporation, and Southern California Edison Company, Defendants and Appellants.

Assignment of Errors on Appeal.

Now come the defendants in the above entitled cause and file the following assignment of errors upon which they will rely upon their prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the 5th day of April, 1920.

I.

That the United States Circuit Court of Appeals for the Ninth Circuit erred in reversing the decree rendered in favor of defendants by the District Court of the United States, Southern District of California, Northern Division, on the 10th day of February, 1919, and in ordering that a decree be entered in favor of the United States cancelling the orders approving the maps of location for the right of way.

II.

That the court erred in enjoining the defendants from further maintaining their canal on the forest reserve right of way.

III.

That the court erred in reversing the finding of the District Court that there was no fraud practiced by the defendants upon the Secretary of Interior and Government land officers in obtain-
135 ing said grant and in holding that the grant of right of way obtained by defendants was secured through fraud practiced upon the Government and in decreeing against defendants on that ground.

IV.

That the court erred in decreeing that even though the right of way was granted by the Secretary of Interior with full knowledge

of all the facts and without fraud that the grant was in excess of the authority of the Secretary of Interior and therefore void.

V.

That the court erred in decreeing that the defendants are operating and maintaining a canal used solely for the purpose of generating, manufacturing and distributing electrical power over a public forest reserve of the United States without obtaining the necessary permit from the Secretary of Interior and without authority of law.

VI.

That the court erred in decreeing that Sections 18 and 19 of the Act of March 3, 1891 (26 Stats. 1095) and the amendment thereto of May 11, 1898 (30 Stats. 404) applied only to grants of rights of way for irrigation purposes and did not include general power purposes.

VII.

That the court erred in decreeing that the Attorney General had authority or standing in court to bring action to cancel and annul defendants' right of way without legislative authority from Congress.

VIII.

That the court erred in decreeing that the suit on behalf of the United States to cancel and annul defendants' patent and to
136 enjoin the use thereof was not barred by Section 8 of the Act of March 3, 1891 (26 Stats. 1095).

IX.

That the court erred in decreeing that the United Sates District Court for the Southern District, Northern Division, had jurisdiction of the action brought on behalf of the United States to cancel and annul the grant of defendants' right of way.

X.

That the court erred in sustaining the ruling of the United States District Court for the Southern District, Northern Divison, denying defendants' motion to dismiss the second amended bill of complaint filed October 29th, 1917, in said cause, on the ground that it appeared from said bill that the court had no jurisdiction of the subject matter of said bill, in that there is no legislative provision or law in force to authorize institution of the suit or any action by the court in the premises.

Wherefore, the defendants pray that the said decree of the United States Court of Appeals for the Ninth District be reversed and that said court be ordered to enter a decree in favor of defendants in accordance with the decree rendered by the District Court of the United States in and for the Southern District of California, Northern Division, and to decree that said District Court had no jurisdiction to entertain said action.

J. A. GIBSON,
GIBSON, DUNN & CRUTCHER,
Attorneys for Defendants and Appellants.

[Endorsed:] Assignment of Errors on Appeal to Supreme Court U. S. Filed April 26, 1920. F. D. Monckton, Clerk.

137 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3406.

THE UNITED STATES OF AMERICA, Appellant,

vs.

KERN RIVER COMPANY, a Corporation; PACIFIC LIGHT & POWER Corporation, and Southern California Edison Company, Appellees.

Stipulation as to Agreed Statement of the Case and Bill of Exceptions on Appeal to the Supreme Court of the United States.

It is hereby stipulated by and between the parties to the above cause that the agreed statement of the case and bill of exceptions on appeal to the Supreme Court of the United States shall consist of the matter and documents appearing in the transcript of record, on file in this Court, appearing on page 21 to and including page 137 to the words on last said page, viz. "Attorneys for Plaintiff," and also the stipulation appearing on page 138 of said record and dated October 2, 1919, changing the words in all of said documents where required from the words Circuit Court of Appeals of the United States, Ninth Circuit to the words Supreme Court of the United States.

Dated this twenty-sixth day of April, 1920.

ROBERT O'CONNOR,
H. P. DECHANT,
Attorneys for Complainant and Appellee.
J. A. GIBSON,
GIBSON, DUNN AND CRUTCHER,
Attorneys for Defendant and Appellant.

[Endorsed:] Stipulation as to agreed statement of the case and bill of exceptions on appeal to the Supreme Court of the United States. Filed April 26, 1920. F. D. Monckton, Clerk.

138 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3406.

THE UNITED STATES OF AMERICA, Appellant,

vs.

KERN RIVER COMPANY, a Corporation; PACIFIC LIGHT & POWER Corporation, and Southern California Edison Company, Appellees.

Stipulation Waiving Bond on Supersedeas and for Costs on Appeal to Supreme Court U. S.

It is hereby stipulated by the parties in the above entitled cause that the bond on supersedeas and costs are hereby waived, and that writ of supersedeas may issue on the appeal in the above cause.

Dated this twenty-sixth day of April, 1920.

ROBERT O'CONNOR,
H. P. DECHANT,
Attorneys for Complainant and Appellee.
J. A. GIBSON,
GIBSON, DUNN & CRUTCHER,
Attorneys for Defendant and Appellant.

[Endorsed:] Stipulation waiving bond on supersedeas and for costs. Filed April 26, 1920. F. D. Monckton, Clerk.

139 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3406.

THE UNITED STATES OF AMERICA, Appellant,

vs.

KERN RIVER COMPANY, a Corporation; PACIFIC LIGHT AND POWER Corporation, and Southern California Edison Company, Appellees.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and thirty-eight (138) pages, numbered from and including 1 to and including 138, to be a full, true and correct copy of the record under Rule 8 of the Supreme Court of the United States, in the above-entitled cause, including the Assignments of Errors on Appeal to the Supreme Court of the United States, including the

Opinion filed in the said Circuit Court of Appeals in the above-entitled case, as the originals thereof remain on file and appear of record in my office, and that the same constitutes the transcript of record upon appeal to the Supreme Court of the United States in the above-entitled cause as made and certified pursuant to stipulation of counsel filed April 26, 1920.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 4th day of May, A. D. 1920.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk,
By PAUL P. O'BRIEN,
Deputy Clerk.

Endorsed on cover: File No. 27,675. U. S. Circuit Court Appeals, 9th Circuit. Term No. 332. Kern River Company, Pacific Light and Power Corporation and Southern California Edison Company, appellants, vs. The United States of America. Filed May 10th, 1920. File No. 27,675.

In the District Court of the United States, Southern District of California (Northern Division).

No. A-20. Equity.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

KERN RIVER COMPANY, a Corporation, Defendant.

Conclusions of the Court.

There are some very interesting features in this suit. The court is particularly thankful to the attorneys on both sides for the able manner in which they have presented their contentions.

This is a suit in equity, concerning a grant made by the plaintiff to the defendant of a right of way, under the Acts of March 3, 1891, (26 Stats. 1095) and May 11, 1898, (30 Stats. 405).

The defendant was organized for the purpose "of building, constructing, maintaining and operating canals, ditches, reservoirs, etc., for carrying, storing and supplying water for the purpose of irrigation, and for carrying, supplying and storing water for the operation of machinery for the purpose of generating and transmitting electric and other power for the supplying of mines, quarries, railways, tramways, mills and factories with electric and other power and also for the supplying of electric and other power for lighting and heating mines, quarries, mills, factories, incorporated cities and towns, villages, or towns, situated in territory other than the State of Maine, and to acquire by purchase or otherwise, buildings and other improvements in or upon which to erect, install, place, use or operate machinery for the purpose of generating and transmitting electric and other power and for any of the purposes or uses above mentioned, and to acquire, or possess, contract for, sell and transfer water and water rights, and to contract for, and sell, in the State of California and elsewhere than in the State of Maine, electric and other power for any purpose whatsoever." The Articles of Incorporation were filed with the Government, with the defendant's application for a right of way for a canal, etc., on or about the 3rd day of June, 1898. Which application consisted, among other things, of a certain map of survey, showing the definite location of said proposed canal upon certain portions of the public domain. The map was refiled by defendant on November 3, 1898. The endorsement upon the map stated that the right of way for said canal was desired solely for the purposes prescribed by the aforesaid acts. This map was approved by the Secretary of the Interior on or about the 14th day of April, 1899. The canal was constructed by reason of the authorization so given by said approval, but was not constructed according to the surveys upon said map so approved. And, subsequently, the defendant filed, after the construction thereof, a map with the Government,

showing the final location of said canal along the line of its construction.

It will be more convenient to state other facts, and probably the case will be better understood if other facts are stated, when discussing certain propositions of law arising in the case. The bill prays that the approval of the maps made by the Secretary of the Interior be canceled; that all the proceedings be set aside; that the title of the Government be quieted as against the defendant; and that the defendant be enjoined from using said right of way until it has made application for the same and received the approval of the Secretary of the Interior under the Act of February 15, 1901.

There are two aspects of this bill. One charges fraud perpetrated upon the Government in the application for the grant. The other aspect of the bill relies upon a forfeiture of the grant, by reason of the alleged non-performance by the defendant of the conditions subsequent in the grant or a breach of a continuing covenant.

I will first dispose of the second aspect of the bill as above stated. The plaintiff claims that the defendant's grant gives to the defendant the right to use the right of way, contained in the grant, only for the purpose of irrigation, or "for the development of power as subsidiary to the main purpose of irrigation." The defendant is not using the right of way for irrigation at all and never has so used it, and the plaintiff claims that the grant should be forfeited to the Government for failure to so use said right of way. The plaintiff claims that the grant contains a covenant, either in the form of a condition subsequent that it be so used or as a continuing covenant that it be so used. Conceding that the plaintiff is right in making the contention concerning these covenants, the question arises, can this suit be maintained without an Act of Congress declaring a forfeiture? The Constitution provides that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. In this suit Congress is, by reason of the provision of the Constitution above referred to, the grantor. Congress has control of the rights of the Government in this regard and it has not declared a forfeiture of the grant for the cause under discussion, either in the act, making the grant, or by any other act of Congress.

Section 20 of the Act of March 3, 1891, provides: "That if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any incompleted section of said canal," etc. This suit, however, is not brought by reason of the forfeiture declared in that section. The case of the United States v. Whitney, 176 Fed. 593 was a case brought to enforce the forfeiture provided in Section 20, as above quoted, and it is not in point here. The decisions of the Courts, the opinions of the Attorneys General and the Acts of Congress upon this subject are reviewed very thoroughly and ably by Judge Rudkin in United States v. Washington Improvement & Development Company in 189 Fed. 674. The reasoning there and the authorities cited are so convincing and so satisfactory that I do not deem it necessary to go into this matter any further. I

therefore, hold that as to the aspect of the bill under discussion, the suit cannot be maintained.

As to the first aspect of the bill above referred to, it will be necessary to state additional facts in reference to this question. Was there fraud perpetrated upon the Government by the defendant in its application for the grant? To determine this question, it will be convenient to state here some provisions of the Acts of Congress relative to this matter. Section 18 of the Act of March 3, 1891, provides:

"That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company, formed for the purpose of irrigation and duly organized under the laws of any state or territory, which shall have filed or may hereafter file with the Secretary of the Interior a copy of its articles of incorporation," etc.

Subsequently, on May 11, 1898, Congress passed an Act, the second section of which provides:

"That the rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty and twenty-one of the Act entitled 'An Act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation."

It is plain that the above quoted provisions of the two statutes must be read together. Section 2 of the Act of 1898 is a modification of the provisions of the Act of 1891. Section 2 above quoted plainly provides for the granting of rights of way for two distinctly separate purposes; that is to say, first, rights of way for ditches, canals and reservoirs granted may be used "for purposes of a public nature"; second, said rights of way granted may be used "for the development of power as subsidiary to the main purpose of irrigation."

The facts concerning the application for the grant and the approval thereof under the above provisions of law are as follows: In 1896, and thus prior to the passage of the Act of 1898, and prior to the organization of the company, a prospectus was issued by a predecessor of the company and by a person who became an engineer of the defendant, which plainly showed that the intent and object of the enterprise was for the generation of electrical energy, and to convey and sell the same to various consumers as far as Los Angeles. There is no evidence that this prospectus was ever called to the attention of the Secretary of the Interior prior to the approval of the rights of way as hereinafter set forth. Thereafter, on September 24, 1897, the defendant wrote to the commissioner of the General Land Office and stated to the commissioner that the company was organized for the purposes of irrigation and the generation and electrical transmission of power, and requesting information concerning the grant

of a right of way over the Sierra Forest Reservation, for a canal, etc. On November 12, 1897, the defendant wrote to the Commissioner of the General Land Office, in which maps and plats were forwarded to the Commissioner. This letter states that an application is made in order that the Kern River Company, organized for the purposes of irrigation and for the generation and distribution of electric power, may obtain the benefits afforded under the Act of Congress, approved March 3, 1891. On April 15, 1898, the Commissioner of the General Land Office wrote a letter to the Register and Receiver of Visalia concerning this matter, in which the maps, etc., so filed as aforesaid by the company, were rejected. As stated at the beginning hereof, prior to June 3, 1898, the company filed with the Secretary of the Interior copies of its articles of incorporation, which set forth the purposes for which the company was organized, as above referred to. On June 3, 1898, a map of the right of way desired by the defendant was filed under the Act of March 3, 1891, and of May 11, 1898. This is the map that was refiled on November 3, 1898, and upon which map appeared the following representation, "And I further certify that the right of way for said canal is desired solely for the purposes prescribed by the aforesaid acts." On April 14, 1899, the Secretary of the Interior endorsed upon said map his approval of the same. This act of the Secretary of the Interior consummated the grant to the defendant. The construction of the canal was begun in July, 1902. In the meantime the company had acquired a claim to water rights, which entitled it to use the water for irrigation and for the purpose of generating electric power. Some of the notices of appropriation specified that the water was to be used for the purpose of the generation of electric power only. In December, 1904, the defendant entered into an agreement, settling litigation between Miller & Lux and the defendant. This agreement provided that the defendant should not use any water for irrigation, and a decree was entered by the Superior Court of Kern County, California, in said litigation, incorporating said agreement into the decree and enjoining the defendant from using any water out of Kern River for irrigation. On January 19, 1905, the defendant filed a map of an amended location under the Act of March 3, 1891, upon which appeared this representation: "That the company has in all things complied with the Act of Congress of March 3, 1891, granting the rights for canals, ditches, etc., through the public lands of the United States." On July 29, 1905, the Commissioner of the General Land Office wrote to the Register and Receiver of Visalia, concerning the map filed January 19, 1905, as follows: "The company's attention is called to the fact that unless the canal, as shown by amended survey of the amended definite location, is desired for the purpose of irrigation only, the application cannot be granted under the Act of March 3, 1891 (26 Stats. 1095) under which it is filed, but should be filed under the Act of February 15, 1901 (31 Stats. 790), which grants a permission to use the right of way over the public lands for irrigation and other purposes." On September 2, 1905, the map of amended location was refiled by the defendant under the Acts of March 3, 1891, and May 11, 1898, with a second certificate, containing this

representation, "I further certify that the right of way herein described is desired for public purposes." The filing of this second map was for the purpose of getting a right of way over the land where the canal had not been constructed in accordance with the first application. At the time of filing this second map, the defendant abandoned that part of the right of way first above granted in April, 1899, not used by the defendant in constructing this canal.

The fraud relied upon by the plaintiff, though not very specifically pointed out in the bill, evidently consists in the claim made by the plaintiff, as set forth in the first amended bill, that the defendant represented that it desired said rights of way for a canal, reservoirs, etc., to be used by the defendant for the main purpose of irrigation and not otherwise. This is what the attorney for the plaintiff claimed in the argument presenting the case to the court. In the second amended bill filed October 28, 1917, the plaintiff alleges that the defendant represented to the plaintiff, at the time of said application, that the defendant wanted said rights of way for irrigation and public purposes and not otherwise, and that the defendant intended to use said canal solely for the purpose of generating electric power for sale. If the defendant suggested to the plaintiff as a fact that it intended to use said canal, reservoirs, etc., for the main purpose of irrigation and not otherwise, when the defendant did not so intend, it would, of course, be a fraud. Or if the defendant suppressed the fact that it did not intend to use said water for irrigation and represented to plaintiff that it intended to so use it, it would be a fraud. One will look in vain for a suggestion by the defendant to the Department of the fact that it intended to use the canals for the sole purpose or irrigation and in view of the representations made by the defendant at the time of making the applications, it is plain to the Court that the defendant did not suppress the fact that it did not intend to use the right of way for irrigation. When the application was first presented, the defendant intended to use part of the water for irrigation. The facts all the way through show that the defendant intended to use the right of way for the purpose of generating power, and all the representations made to the Secretary of the Interior are consistent with that fact. It is perfectly plain that the defendant did not seek said right of way for canals, for the sole purpose of irrigation, but sought said right of way for the principal purpose of generating power. When the work was completed, and the map, amending the location, was filed, the certificate on the map was that the defendant had complied with the Act of March 3, 1891. The defendant was then informed that unless it intended to use said right of way solely for the purpose of irrigation, the maps could not be approved, and the Department suggested to the defendant that it apply under the Act of February 15, 1901. Then what happened. Did the defendant comply with the suggestion of the Department? Not at all. The defendant refiled the map with the statement "that the right of way herein described is desired for public purposes," that is to say, the defendant wanted to operate under that provision of the Act of 1898, which provided that said right of way for ditches, canals or reservoirs, granted, "may be used for purposes of a public nature."

I cannot construe the certificate of the defendant to mean anything else. It was certainly sufficient to inform the department that the rights of way were not wanted solely for the purpose of irrigation. On November 27, 1905, the Secretary of the Interior endorsed upon the last aforesaid map, the following: "Approved subject to all valid existing rights." This was a confirmation of the grant as then applied for. The bill alleges that when the Secretary of the Interior approved the first map on or about April 14, 1899, he believed and relied upon the representations made, as above set forth, and believed that said canal was to be used by said defendant for the main purpose of irrigation and not otherwise. The bill further alleges that when the Secretary of the Interior on November 27, 1905, approved the second map that he believed and relied upon the representations so made by said applicant as aforesaid, and believed that said canal was to be used by said defendant for irrigation and public purposes, and not otherwise. There is no evidence to show what the Secretary of the Interior believed when he performed said acts as aforesaid. Said allegations in the bill must be supported, if at all, by virtue of the representations above herein set forth. It would seem impossible that the Secretary of the Interior could have been deceived by any of these representations or endorsements upon the maps or anything else that has been proven in this case. It appears to be perfectly plain what the defendant wanted, and the defendant plainly made its representations to the Government. If the representations of the defendant concerning the defendant's desire to use said right of way for public purposes were not sufficient to inform the Secretary of the Interior as to the exact purpose for which the defendant desired said right of way, it seems that it was the duty of the Secretary of the Interior to so inform the defendant. The Secretary of the Interior seemed to be alive to his duties, because previously he had pointed out to the defendant that if the right of way were not to be used solely for the purposes of irrigation, it could not be granted. But, notwithstanding the fact that the defendant declined to so certify, and certified as above stated, that the defendant desired to use said right of way "for public purposes," the Secretary of the Interior approved said map.

The attorney for the plaintiff, in submitting this suit, argued to the court that the Secretary of the Interior had made a mistake of fact. If the Secretary of the Interior supposed that application was made for the main purpose of irrigation, when it was not, it should be regarded as a mistake of fact. The court, however, cannot help but conclude that the Secretary of the Interior knew exactly what the defendant was doing and what it wanted to do, and that no mistake of fact was made. There is no proof submitted to the court in support of the allegations of the bill in this regard, except what may be inferred from the facts hereinabove recited. These facts would not justify the Secretary of the Interior in believing that the canal was to be used for the main purpose of irrigation. The application of the defendant for pole lines, etc., to be apparently used in connection with this project, was before the Secretary of the Interior. Mistake of fact must be proven like any other facts. The court

cannot assume that simply because the Secretary of the Interior acted upon these meagre representations made by the defendant, that the Secretary believed something else aside from what the representations were.

Another point that the plaintiff makes in argument is that the officers had no power to approve an application for a grant for purposes of a public nature. There is no allegation in the bill or suggestion that the Secretary of the Interior was imposed upon concerning this matter, nor is there any allegation in the bill that the defendant is not using the right of way for purposes of a public nature. The entire theory of the bill, as shown by all its allegations, is to the effect that the application was granted solely for irrigation or for irrigation with the subsidiary purpose of development of power. If the plaintiff desired to present in this bill that the defendant practiced a fraud upon the plaintiff, in securing a right of way for a canal for purposes of a public nature, it was the duty of the plaintiff to so allege and present that issue. The bill alleges that the defendant is not using the right of way for irrigation, but it does not allege anywhere that the right of way is not used for purposes of a public nature. There is no allegation in the bill concerning the use to which the defendant is putting the right of way. It is plain that if the plaintiff desired to present the proposition in this suit that there was no power in the Secretary of the Interior to approve the application for the grant, as it was finally submitted to him; that is to say, for public purposes, or, that the Secretary of the Interior misapprehended the law when he approved such application, it was the duty of the plaintiff to set forth the facts concerning said proposition in the bill. Undoubtedly, when the defendant made its application for a right of way for public purposes, it meant that it desired that right of way for purposes of a public nature. In view of the fact that the Secretary of the Interior had suggested that unless the defendant desired said right of way solely for irrigation it could not be granted, that then the defendant sought to take advantage of the provision of law, authorizing a grant for purposes of a public nature. A right of way granted for public purposes certainly would include purposes of a public nature. Undoubtedly, the Secretary of the Interior knew that the defendant was desiring to take advantage of that provision of the law authorizing a grant to be used for purposes of a public nature. The proposition here under discussion is not in issue. It is, however, stipulated by the parties:

"It is further stipulated that defendant has never used said canal for the purpose of irrigation, but has ever used, and now uses, the same solely for the purpose of carrying water to be used to generate electric power, which the said company sells mainly for the purpose of furnishing motor power to certain electric railway systems in and around certain municipalities in said southern division of the southern district of the State of California, and for supplying light for different municipalities throughout said southern district of California and that a part of the electricity generated by the said company is being sold by the said company to farmers and ranchers

along the line of the electric power distributing system of said defendant, which said power is used for the purpose of pumping water to be, and which is, used for irrigating land."

The stipulation as to these facts is made in response to the issue tendered by the bill that the right of way was not used for the purpose of irrigation.

There was some argument indulged in at the trial by the parties as to whether or not the use to which the right of way is being put by the defendant is a use of a public nature. It is not necessary for the Court to decide whether or not it is a use of a public nature within the meaning of the Act of May 11, 1898. It is sufficient for the Court to say that the matter here under discussion is not in issue at all. Or, if the grant were made for use of a public nature and it is not being so used, then the question is like the one first discussed by the Court. That is to say, if the defendant secured this right of way for purposes of a public nature and the right of way is not so used, the remedy is by an Act of Congress declaring a forfeiture, and a suit setting forth different facts than are stated in this bill.

Dated this 10th day of February, 1919.

OSCAR A. TRIPPET,
Judge.

Form 354. Original. No. A-20 Equity. U. S. District Court, Southern District of California (Northern Division). The United States of America, Plaintiff vs. Kern River Company, a corporation, Defendant. Conclusions of the Court. Filed Feb. 10, 1919. Chas. N. Williams, Clerk. Ernest J. Morgan, Deputy.

I, Chas. N. Williams, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of an original conclusions of the court filed in the Clerk's Office February 10, 1919, in the cause entitled: The United States of America, Plaintiff, vs. Kern River Company, a corporation, Defendant, No. A-20 Equity, Northern Division, as the same remains on file therein.

Attest my hand and the seal of said District Court, this 5th day of April, A. D. 1921.

[Seal of the U. S. District Court, Southern Dist. of California.]

CHAS. N. WILLIAMS,
Clerk.

By R. S. ZIMMERMAN,
Deputy Clerk.

[Endorsed:] No. A-20 Equity. United States District Court, Southern District of California (Northern Division). The United States of America, Plaintiff, vs. Kern River Company, a corporation, Defendant. Conclusions of the Court.

Supreme Court of the United States, October Term, 1920.

No. 332.

KERN RIVER COMPANY et al., Appellants,

vs.

THE UNITED STATES OF AMERICA.

It is agreed by and between counsel for the respective parties in this case that the foregoing certified copy of conclusions of the District Court of the United *of the United* States for the Southern District of California may be added to and taken as a part of the transcript of the record in this cause.

J. A. GIBSON,
For Appellants.
LESLIE C. GARNETT,
For Appellee.

[Endorsed:] File No. 27,675. Supreme Court U. S., October Term, 1921. Term No. 50. Kern River Company et al., appellants, vs. The United States of America. Stipulation of counsel and addition to record. Filed April 25, 1921.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1920.

No. [redacted]

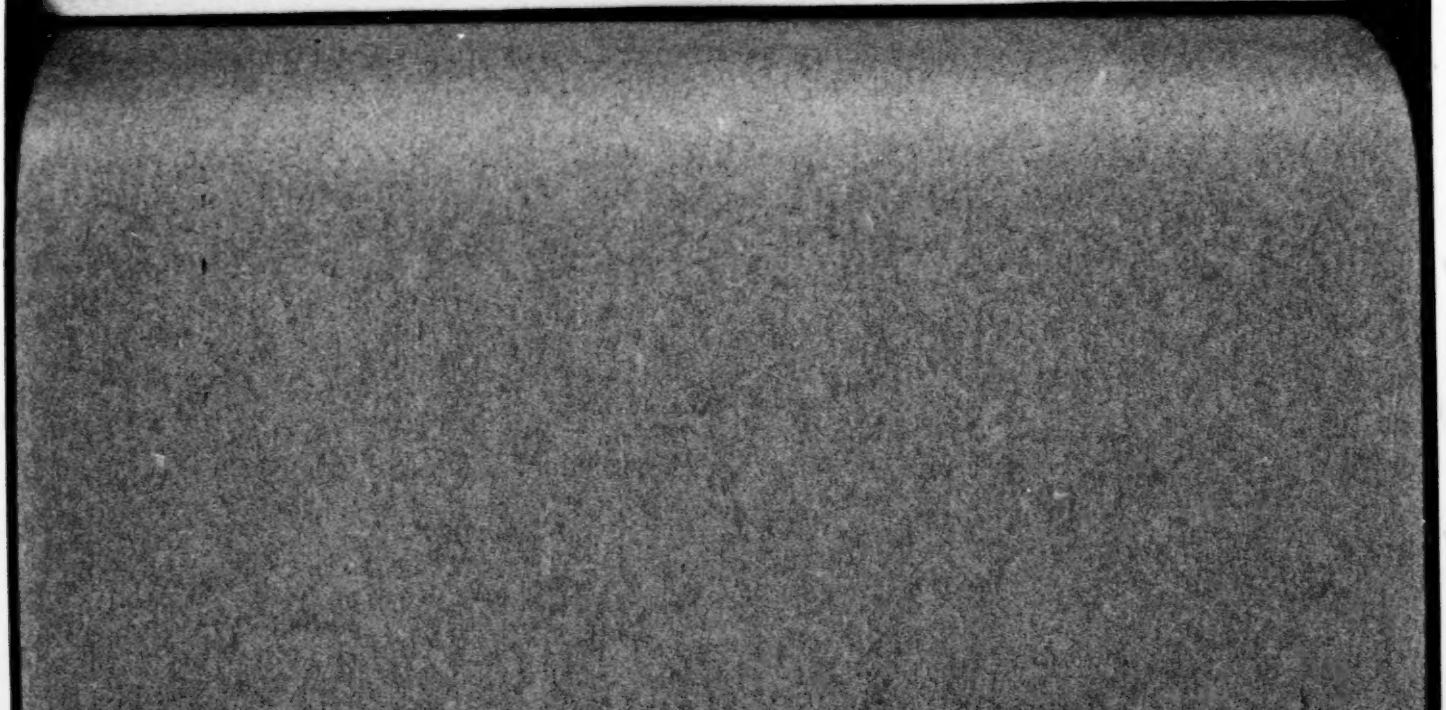
Kern River Company, Pacific Light and Power Corporation, and Southern California Edison Company,
Appellants,
vs.
The United States of America.

BRIEF OF APPELLANTS.

JAMES A. GIBSON,
ROY V. REPPY,
Attorneys for Appellants.

HENRY F. PRINCE,
Of Counsel.

Parker & Stone Co., Law Printers, [redacted] Los Angeles



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IN THE

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October Term, 1920.

No. 332.

Kern River Company, Pacific Light and Power Corporation, and Southern California Edison Company,
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vs.

The United States of America.

BRIEF OF APPELLANTS.

STATEMENT.

This is an action in equity, begun by filing a bill seeking to forfeit the right-of-way obtained by the Kern River Company and its successors in interest, appellants, for certain rights-of-way across Government land under the Acts of March 3, 1891, 26 Stats. 1095, and May 11, 1898, 30 Stats. 405. The Kern River Company, hereinafter also called appellant, was organized

(under the laws of the state of Maine) for the purpose of "building, constructing, maintaining and operating canals, ditches, reservoirs, etc., for carrying, storing and supplying water for the purpose of irrigation, and for carrying, supplying and storing water for the operation of machinery for the purpose of generating and transmitting electric and other power for the supplying of mines, quarries, railways, tramways, mills and factories with electric and other power for lighting and heating mines, quarries, mills, factories, incorporated cities and towns, villages, or towns situated in territory other than the state of Maine, and to acquire by purchase or otherwise buildings and other improvements in or upon which to erect, install, place, use or operate machinery for the purpose of generating and transmitting electric and other power, and for any of the purposes or uses above mentioned, and to acquire or possess, contract for and sell, in the state of California and elsewhere than in the state of Maine, electric and other power for any purpose whatsoever."

At the filing of the first application for a right-of-way for a canal, etc., on or about the 3rd day of June, 1898, appellant Kern River Company filed with the proper officers of the government its articles of incorporation. The application filed consisted, among other things, of maps and surveys showing the definite loca-

tions of the proposed canal upon certain portions of the public domain. Thereafter the map was refiled by appellant on November 3, 1898. Appellant's endorsement upon the map stating that the right-of-way for said canal was desired solely for the purposes prescribed by the aforesaid acts. Thereafter on April 14, 1899, the Secretary of the Interior approved this map and application of appellant. The canal was thereafter constructed under the authorization so approved, but in the course of construction deviated to some extent from the map and profiles contained in the approved maps, and subsequently the appellant filed with the Government, after the completion of the canal, a map showing the final location of the canal along its exact line of construction.

The Kern River Company had obtained from its predecessor in interest, the Kern River and Los Angeles Electric Power Company, water rights to a considerable extent in Kern River which were deeded to it on July 17, 1897. These water rights are set out in full in the stipulation of facts [Rec. p. 34], as well as further rights acquired thereafter. Operation of the power plant began December 31, 1904. Prior thereto and on April 17, 1903, an action was begun in the Superior Court of Kern county by Miller & Lux *et al.* v. The Kern River Company *et al.*, to restrain the appellant from divert-

ing water from the Kern River. This suit was later transferred to the Federal Court, Southern District of California, and was numbered 56 Equity.

On March 24, 1904, another suit, No. 4739, was filed in the Superior Court of Kern county by Miller & Lux v. A. Brown Company, Kern River Company *et al.* A final decree was entered in the state court, set out in full as Exhibit 5 [Rec. pp. 48-60]. As a result of these suits, on December 23, 1904, the Kern River Company, through its president, entered into an agreement with Miller & Lux *et al.*, in which the company agreed that all water diverted by it in said canal should be used solely for the purpose of generating power, and for no other purpose. This agreement was incorporated in the final decree in suit No. 4739.

The amended definite location of the right-of-way for the canal under the Acts of March 3, 1891, and May 11, 1898, heretofore referred to, was filed on January 19, 1905, and refiled September 2, 1905. This was approved by the Secretary of the Interior November 27, 1905 [Rec. p. 36]. The Government land involved is described in paragraphs VI and XIV of the bill [Rec. pp. 3, 7]. A map showing the whole system is set out [Rec. p. 40]. This right-of-way has been used since the beginning of operations on December 31, 1904.

On March 12, 1908, the Secretary of Agriculture reported to the Secretary of the Interior that the Kern River Company was using its right-of-way for power purposes instead of irrigation, and on September 27, 1908, notice was served through the register and receiver of the Independence Land Office upon the Kern River Company to show cause within ninety days why suit should not be instituted to cancel said grants. The Kern River Company thereupon filed an answer in response to the notice to show cause. On November 12, 1909, the Secretary of the Interior decided (there having been no evidence introduced by either side) that the grant had been made for irrigation purposes and not for the development of electrical power, and on November 19th the Commissioner of the Land Office, pursuant to instructions of the Secretary of the Interior, gave the company sixty days' notice to amend the application filed June 19, 1905, to bring it within the Act of February 15, 1901 (31 Stats. 790). This the company failed to do, and the present action was filed in September, 1914.

Pending the application negotiations, and on July 29, 1905, the Commissioner of the General Land Office had addressed a letter to the register and receiver at Visalia, calling attention to the Kern River Company and stating that unless the canal, as shown by the amended survey of

the amended definite location, was desired for the purpose of irrigation only, the application could not be granted under the Act of March 3, 1891, but should be filed under the Act of February 15, 1901. This information was communicated to the Kern River Company [Rec. p. 37]. Thereupon the appellant refiled the map with the endorsed statement *"that the right-of-way herein described is desired for public purposes."* The act provided that a right-of-way might be obtained for public purposes, as well as for irrigation purposes, the pertinent sections of the act being hereinafter set forth. The letters passing between the Kern River Company and the Land Office are set forth [Rec. pp. 23 to 29].

The property of the appellant referred to consists of a canal or water conduit with a power house containing hydro-electric generating machinery and high power electric transmission lines. The canal takes water from the Kern River in a mountain valley in Kern county, with the intake of the canal in the northeast quarter of the southeast quarter of section 35, township 25 south, range 33 east, M. D. M., and extends along a side hill and along the Kern. River for a distance and then crosses the river and the valley and skirts the hills and returns to the riverside again, and thence along the river to the power house on the east half of the southwest

quarter of the southeast quarter of section 10, township 27 south, range 32 east, M. D. M., a distance from the head of the canal of about eleven miles. The power house site is known as Borel.

On the last described property is situated the hydro-electric generating house, plants and appurtenances, and this canal, with the generating plant, exclusive of the transmission line, cost about $1,935,000.

The equipment in the power house consists of four 3600 h. p. and one 3200 h. p. water wheels, operating under a static head of 262 feet, each wheel being directly connected to a 2000 k. w. 3-phase 50-cycle 2200-volt generator. The capacity of the generating plant in k. w. hours is 10,000, equal to 13,405 h. p.

The electricity generated is transmitted over pole lines consisting of poles and copper wires, with telephone lines used in the operation of the plant. The transmission line consists of two parallel pole lines, each pole line supporting one 60,000-volt 3-phase circuit, and one wholly metallic telephone circuit. The length of each pole line from power house to city of Los Angeles is 127 miles. The cost of the transmission lines and telephone lines was $1,064,000, making the total cost of said canal, electric generating plant and transmission lines $3,001,000.

The bill was brought against appellant, Kern River Company, on the ground that the right-of-way had been obtained by fraud and mis representation and upon the ground that appellant was using the right-of-way for purposes other than those under which it had been acquired, namely, for purposes other than irrigation or power purposes subsidiary to the main purpose of irrigation. There was no allegation in the bill that the right-of-way was not being used for purposes of a public nature.

The allegations of misrepresentation and fraud, as well as the allegations of misuser by the appellant, are set forth in the amended bill [Rec. pp. 3, 6, 7]. The answer of defendant Kern River Company to the amended bill is set out in full [Rec. pp. 13 to 33], putting in issue all allegations of fraud, misrepresentation and mistake, as well as allegations of misuser alleged in plaintiff's bill, and further setting out the statute of limitation and also laches as a bar to the action here brought. It is further alleged in appellant's answer [Rec. p. 22] that the Department of the Interior had at all times full knowledge of the purpose to use and of the use by this appellant of the said canal, electrical generating power house system, etc. The right of the plaintiff to sue without legislative authority is also put in issue by appellant's answer [Rec. p. 22].

The allegations of misrepresentation and fraud relied upon by plaintiff and from which all the other alleged conclusions are drawn, are:

(a) "That the right-of-way for said canal was desired solely for the purposes described in the aforesaid acts (March 3, 1891, and May 11, 1898)." [Paragraph 4 of the amended complaint, Rec. p. 3.]

(b) "That the right-of-way described on said map was desired for public purposes." [Paragraph 9 of amended complaint, Rec. p. 5.]

These are the only allegations of misrepresentation made in connection with the application for the right-of-way.

(c) "It is further alleged that these said representations were untrue and false in this—that the defendant did not intend to use said canal for irrigation or public purposes, but intended to use said canal solely for the purpose of generating electrical power for sale." [Paragraph 11, amended bill, Rec. p. 6.]

(d) "That the Secretary of the Interior being deceived by said false representations granted said application, and further that the approval of the said maps and applications were given by the Secretary of the Interior through a mistake, error and inadvertence, in the belief that said canal was to be used for the main purpose of irrigation, that the canal would be so used by the defendant, and there was attached to said grant implied conditions that said canal was to be used for the purpose of irrigation." [Paragraph 17 of the amended bill, Rec. p. 8.]

All of these allegations a, b, c and d were based upon, or rather are inference drawn by

the plaintiff from the first two (a and b) allegations of misrepresentation. All of these allegations were put in issue; except, that it was admitted that the first two, a and b, were true, as statements made on the accompanying applications, constituting the application for the right-of-way; and the manner in which the right-of-way was obtained is fully set forth in appellant's answer to the bill in the further, separate and second defense, paragraphs 1 to 8, inclusive [Rec. pp. 17 to 22].

The trial court, after considering all of the issues made by the pleadings and the evidence introduced on behalf of both parties to the cause, dismissed plaintiff's bill and filed separate conclusions. These latter conclusions are not in the record nor have they been printed, but the court passed upon all the issues tendered excepting the statute of limitations set up in paragraph second of the separate and third defense of defendant in its answer [Rec. p. 22]. The court had previously denied a motion to dismiss the bill for want of equity and for lack of jurisdiction because no legislative authority to sue was shown [Rec. pp. 12 and 13]. The court, evidently desiring to pass upon the merits of the case rather than dispose of it on said motion, on full hearing dismissed the bill as stated. The grounds of this motion

were preserved in defendant's answer and set up as a third separate defense [Rec. p. 38].

The trial court in dismissing the bill found that there was no fraud perpetrated on or misrepresentations made to the Department of the Interior in obtaining the right-of-way in question. It also found that in the absence of an express forfeiture clause in the law under which the grant was obtained, or of authority from Congress declaring a forfeiture, no right to sue for a forfeiture existed, but it did not pass specifically upon the question of the bar of the statute of limitations.

Specifications of Errors Relied On.

1.

The United States Circuit Court of Appeals for the Ninth Circuit erred in reversing the decree of the United States Court for the Southern District of California, Northern Division, dismissing the bill of the United States and in ordering that a decree be entered in favor of the United States cancelling the orders approving the maps and location for the right-of-way of Kern River Company and in enjoining said company from further maintaining their canal on the forest reserve until said Kern River Company obtained a new permit authorizing the use of said right-of-way.

2.

The United States Circuit Court of Appeals erred in holding that the grant of the right-of-way to Kern River Company was obtained by fraud practiced by said company upon the Department of Interior or by mistake of said department, and in reversing the decision of the District Court holding that there was no fraud or mistake in obtaining said right-of-way.

3.

The United States Circuit Court erred in decreeing that a bill could be brought on behalf of the United States to cancel and annul said right-of-way without authority from Congress either in the act under which said right-of-way

was obtained, or in some other act of Congress giving the Attorney General authority to seek such a forfeiture and in reversing the decision of the United States District Court holding that a declaration of forfeiture by Congress, or authority from Congress to seek a forfeiture was prerequisite to such a suit.

4.

The United States Circuit Court erred in decreeing that said suit was not barred by the six-year statute of limitations contained in section 8 of the Act of March 3, 1891, 26 Stats., page 1099, being a portion of the act under which said right-of-way was obtained.

5.

The United States Circuit Court erred in decreeing that even though fraud or mistake had not been shown, the grant was void because the Secretary of Interior had exceeded his authority in affirming said grant of right-of-way.

6.

The United States Circuit Court erred in decreeing that an injunction against the continued use of the right-of-way by the Kern River Company was a proper remedy under the bill as brought.

7.

The United States Circuit Court erred in decreeing that the Kern River Company is operating and maintaining its canal over a forest reserve of the United States without the necessary permit from the Secretary of the Interior and without authority of law.

Main Propositions Discussed in Appellants' Argument.

In our argument discussing the questions here involved, we shall consider the following propositions:

1. The stipulated facts and reasonable inferences therefrom conclusively establish that there was no fraud perpetrated upon the Department of Interior in obtaining the right-of-way in question, or mistake by said department.

2. In the absence of an expressed forfeiture clause in the law under which the grant was obtained or of authority from Congress declaring a forfeiture no right to sue for a forfeiture exists.

3. The suit was barred by the statute of limitations contained in the act under which the grant was obtained.

4. The question of the Secretary of the Interior having exceeded his authority in approving the grant was not raised by the bill and therefore was not and is not an issue in the case.

5. The learned Circuit Court of Appeals in reversing the decree of the District Court erred in making unwarranted assumptions of fact and erred as to the law applicable thereto.

6. In the absence of a right of forfeiture of appellant's right-of-way an injunction against its further use, accomplishing substantially a forfeiture, is unwarranted.

7. The development of power to be sold to the public comes within the terms "Purposes of a Public Nature," contained in section 2 of the Act of May 11, 1898.

(In the appendix to this brief we have, we believe, printed all statutes in any way involved in this cause.)

ARGUMENT.

I.

The Stipulated Facts and Reasonable Inferences Therefrom, Conclusively Establish That There Was No Fraud Perpetrated Upon the Department of Interior in Obtaining the Right-of-Way in Question, or Mistake by Said Department.

It is appellant's contention that the stipulated facts, the letters passing between appellant and the Department of Interior and all other circumstances in connection with the negotiations pending the obtaining of the grant of right-of-way, establishes the fact that there was no fraud or misrepresentation perpetrated by appellant upon the Department of Interior. The Circuit Court in reversing the decree of the District Court refused to give weight to the judgment of the District Court as expressed in the opinion rendered by the District Court in dismissing the bill, in which opinion it was stated that there was no fraud practiced upon the Department of Interior.

While it is true, as stated by the Circuit Court, that most of the facts were stipulated to, nevertheless there was some oral testimony and the trial court necessarily was compelled to make all reasonable inferences from the facts agreed upon. And as these inferences

were in appellant's favor, as is shown by the dismissal of the bill, it is appellant's contention that so far as such conclusions of the trial court upon questions of fraud or mistake are concerned, they are entitled to great weight, if indeed they are not to be held conclusive upon appellate courts under well established rules in all classes of cases.

It is well settled in the federal courts, as well as in the state courts, that all presumptions are in favor of the correctness of the conclusion of the trial court and that a finding upon a question of fact will not be disturbed unless it is clearly apparent that there was no reasonable evidence upon which the finding could be based. Even if the evidence was conflicting upon such a question, nevertheless the conclusion of the trial court will be sustained unless such conclusion is clearly unwarranted from the evidence.

See:

Halsell v. Renfrow, 202 U. S. 287;

Chicago G. W. Ry. Co. v. Minn. Ry., 176 Fed. 237, 244.

The rule is well stated in 2 R. C. L., Sec. 173:

> "It is a well settled rule that the findings of the trial court where there is conflicting evidence will not be disturbed on appeal or writ of error. Superior appellate courts are of course primarily constituted for the purpose of dealing with questions of law.

> * * * These considerations have led the appellate courts to deal with finding of facts by a court as they would with the verdict of a jury. Following out these general principles, the question for the appellate court is, was there any evidence to sustain the conclusion reached in determining this question. The evidence in the record must be viewed most favorable to the appellee, and if as so considered there is any evidence to meet the requirements of the rule, the findings will not be disturbed."
>
> 2 R. C. L., Sec. 173. Appeal and Error.

The agreed statement of facts shows that the articles of incorporation of the Kern River Company expressly provided, among other purposes, for that of supplying and storing water for the operation of machinery for the generation and transmission of electric and other power, etc. These articles of incorporation were filed with the Government, together with the various maps and surveys called for in obtaining the right-of-way in question. The rights-of-way in question were obtained under the provisions of the Act of March 3, 1891, and of May 11, 1898.

There is no allegation in the bill that the Kern River Company was not using the right-of-way for purposes of a public nature, nor was there any evidence introduced upon this point, nor is there any allegation in the bill concerning the use to which appellant is now putting its right-of-way, other than an allegation that the Kern River Company is now using the right-of-way

for purposes of irrigation. There is no allegation in the bill that the Secretary of Interior did not have authority to grant a right-of-way to be used for purposes of a public nature.

A period of almost nine years elapsed between the final approval of the right-of-way on November 27, 1905, and the filing of the bill to forfeit the same on September 1, 1914. A second amended bill, the one here involved, was not filed until October 29, 1917.

Can it be said, looking at all of the facts in connection with the case, that the right-of-way was obtained by fraud, perpetrated upon the Department of Interior? Section 18 of the Act of March 3, 1891, provided:

> "Sec. 18. That the right-of-way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any state or territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: Provided, that no such right-of-way shall be so located as to

> interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective states or territories."

The Act of May 11, 1898, provided as follows:

> "Sec. 2. That the rights-of-way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the act entitled 'An Act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights-of-way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation."

These two sections must obviously be read and construed together. Section 2 of the Act of 1898, being a modification of the Act of March 3, 1891. Section 2 plainly provides for the acquirement of a right-of-way for two distinct, separate and independent purposes: First, for purposes of a public nature, and, second, for the development of power as subsidiary to the main

purpose of irrigation. The act does not define what is meant by purposes of a public nature, nor was there, so far as we have been able to discover, any statute of Congress or decision of the court which definitely defined what was meant or intended by the phrase "purposes of a public nature."

If power purposes used for operating public utilities as railways and lighting plants may not reasonably be said to be within this portion of the act, it seems difficult to understand what Congress could have meant by this portion of the act, one which was not contained in the prior Act of March 3, 1891. There no doubt may be, and are, many power projects which could not reasonably be said to be among "purposes of a public nature," and this, we believe to be the real reason of the retaining of the concluding phrase "for development of power as subsidiary to the main purpose of irrigation." This construction gives effect to all portions of Section 2 of the Act of 1898 and does so, we submit, without any inconsistency whatever.

In 1896, and therefore prior to the Act of 1898, and prior to the organization of the Kern River Company, a prospectus was issued by a predecessor company showing that it was the purpose of the new company to engage in the enterprises of irrigation and the generation of electrical energy, and to furnish and convey the

same to consumers as far south as Los Angeles, California. The record does not disclose whether the Department of Interior was then aware of this prospectus. There was, however, no evidence introduced to show the contrary.

Thereafter, and on September 24, 1897, the Kern River Company wrote to the Commissioner of the General Land Office, stating that the Kern River Company was organized for the purpose of irrigation and generation and transmission of electrical power, and requesting information concerning the method of acquiring a right-of-way across the Sierra Forest Reserve for its canals, etc.

On November 12, 1897, the Kern River Company forwarded its maps and plats to the Commissioner. This letter, accompanying the maps, again states the purpose of the company to engage in irrigation and power development purposes and applies for a right of way under the benefit of the Act of Congress of March 3, 1891. This application, it is important to notice, was prior to the Act of May 11, 1898, Sec. 2, providing for a right of way for "purposes of a public nature. The Commissioner of the General Land Office wrote the Register and Receiver of Visalia upon this subject, rejecting the maps so filed, on account of technical defects in the maps themselves. The articles of incorporation showing fully the purpose of the Kern River Company

had already been filed with the Department of Interior and on June 3, 1898, a further map was filed under the Act of March 3, 1891, and of May 11, 1898. On this map the Kern River Company certified, through its authorized officers, that the right of way for said canal was desired solely for the purposes prescribed by the aforesaid acts. This certificate was made a short time after the Act of May 11, 1898, went into effect. The change of the form of certificate,—apparently because of the new act of May 11, 1898,—seems therefore perfectly reasonable and natural on the part of the Kern River Company, and to be entirely free from any inference of fraud on its part. The Secretary of the Interior endorsed his approval upon the same on April 14, 1899, thus consummating and completing the grant to the Kern River Company and thereafter and in 1902 construction was commenced by the Kern River Company.

Prior to this time the Kern River Company had acquired claims to certain rights entitling it to use the water thus acquired for irrigation and for the purpose of generating electric power. Thereafter and in December, 1904, in settlement of pending litigation between Miller & Lux and the Kern River Company, an agreement was entered into whereby the Kern River Company agreed that it would not use all its water for irrigation purposes and a decree embodying this

agreement was entered by the Superior Court of Kern county, California, enjoining the defendant from so using any water out of Kern River for irrigation.

On January 19, 1905, the Kern River Company filed its amended location under the Act of March 3, 1891, upon which appeared this representation: "That the company has in all things complied with the Act of Congress of March 3, 1891, granting the rights for canals, ditches, etc., through the public lands of the United States." On July 29, 1905, the General Land Office Commissioner wrote to the Register and Receiver of Visalia concerning the map filed on January 19, 1905, as follows: "The company's attenion is called to the fact that unless the canal as shown by amended survey of the amended definite location is desired for the purpose of irrigation only, the application cannot be granted under the Act of March 3, 1891 (26 Stats. 1095), under which it is filed, but should be filed under the Act of February 15, 1901 (31 Stats. 790), which grants a permission to use the right-of-way over the public lands for irrigation and other purposes."

The Kern River Company on September 2, 1905, refiled its amended map of location under the Acts of March 3, 1891, and May 11, 1898, with a second certificate containing this representation: "I further certify that the right-of-

way herein described is desired for public purposes." This amended location was necessary because of slight deviation in construction from the original maps as filed.

These then are the facts without any evidence being introduced on behalf of the United States as to any actual deception or mistake on the part of the Secretary of Interior upon which the United States Circuit Court reversed the finding and decree of the District Court and decreed that the right of way had been obtained by fraud and misrepresentation. It is difficult to see how it can possibly be said that there was any misrepresentation or fraud perpetrated upon the Department of Interior by either, or any, of the certificates upon the maps filed with the Department.

The certificate that the right of way was desired for public purposes was precisely in accordance with the provisions of section 2 of the Act of 1898, providing for such a purpose. It would be an unusual construction of language to say that this certificate, in accordance with the express provision of the statute, was a false certificate or that it could have been misunderstood by the Department of Interior. There was no suggestion on behalf of the Kern River Company as a fact that it intended to use the canals, reservoirs, etc., for the main purpose of irrigation, and not otherwise.

There is not, however, in the record, and the record fully sets forth all of the facts of the case, the slightest suggestion that the Kern River Company intended to use the canals for the sole purpose of irrigation, and it is plain that the Kern River Company did not suppress the fact that it did not intend to use exclusively the right-of-way for irrigation purposes. As shown by the testimony of Mr. Balch [Rec. pp. 63 to 65], when the application was first presented, the defendant did intend to use part of the water for irrigation purposes. It is clear that the Kern River Company at all times intended to engage in the enterprise of generating power and all representations made to the Secertary of Interior are consistent with that fact.

When the work was completed, the company filed its map of amended location, certifying that it had complied with the Act of March 3, 1891. It was then informed, by letter, that unless it intended to use the right-of-way solely for the purpose of irrigation, the maps could not be approved and the Department suggested to the defendant that application be made under the Act of February 15, 1901. The company apparently not being satisfied that it did not have the right to apply for its right-of-way under the Act of March 3, 1891, and of May 11, 1898, refiled the map with the endorsement thereon that the right-of-way herein de-

scribed is desired for public purposes, a use especially permitted under section 2 of the Act of May 11, 1898.

It is difficult to see how this certificate could be construed to mean anything else. It could certainly not be taken by the department to mean that the right-of-way was wanted solely for the purpose of irrigation. On November 27, 1905, the Secretary of Interior endorsed upon the last map the following: "Approved subject to all valid existing rights." This was a confirmation of the grant as then applied for and under the Act of Congress the title to the right-of-way became vested in the Kern River Company.

It is alleged in the bill that when the Secretary of Interior approved the first map on or about April 14, 1899, he believed and relied upon the representations made and further believed that said canal was to be used by the defendant for the main purpose of irrigation, and not otherwise. It is further alleged that when the Secretary of Interior on November 27, 1905, approved the second map, he believed and relied upon the representations so made by the appellant and believed that said canal was to be used by appellant Kern River Company for irrigation and public purposes, and not otherwise. *These allegations are entirely unsupported by any evidence introduced at the*

trial and must be supported, if at all, by virtue of the representations themselves. To so construe the representations, especially where actual fraud is alleged on the part of the Kern River Company would be an entire departure from the rule requiring that fraud and misrepresentation must be clearly proved.

We do not see how the Secretary of Interior could possibly have been deceived by these representations and endorsements upon the maps or from anything else that was proved in this case. The representations as made were perfectly plain and unequivocal. If it could possibly be said that the Secretary of Interior was insufficiently advised as to the intended use on the part of the Kern River Company, it certainly was his duty to so inform the company. It is apparent that the Secretary of Interior was alive to his duty for the reason that he had specifically pointed out to the company that if the right-of-way was not to be used solely for the purposes of irrigation, it could not be granted.

Notwithstanding these circumstances, the company declined to so certify and certified as above stated that the right-of-way was desired for public purposes, and upon this certificate the Secretary of Interior approved the map. Nor do the facts here presented support the conclusion that the Secretary of Interior had made

a mistake of fact. The same circumstances which show that the Secretary of Interior was not imposed upon establish the fact that the secretary at all times knew exactly what the company was doing and what it wished to do, and that no mistake of fact was made. We wish to again emphasize the fact that no proof was submitted to the court in support of the allegations of the bill in this regard other than what might be inferred from the facts as herein recited.

It is submitted that these facts would not justify the Secretary of Interior in believing that the canal was to be used for the main purpose of irrigation, and for this reason they could not establish the further fact, and one which should be supported by the clearest evidence, that the Kern River Company had perpetrated a fraud upon the Department of Interior.

Furthermore, the application of the Kern River Company for pole lines, etc., to be used in connection with this project was at this time before the Secretary of Interior. If the Secretary of Interior acted upon representations which might possibly be said to be too meagre, this itself is not sufficient ground for saying that the secretary believed something entirely different from what those representations actually were. There was no showing at the trial that the United States was unable to produce testimony from the then officers of the

Department of Interior as to what they believed when they approved the granting of the right of way. In the absence of such a showing, it seems only reasonable to assume that such testimony could not be produced, and that the officers of the Department of Interior would have shown by their testimony, if produced, that they fully understood the situation at the time of the granting of the right-of-way.

It was contended in the lower courts that the Department of Interior had no power to approve an application of a grant for purposes of a public nature. This issue was not raised at the trial court by the bill, nor was any suggestion in the bill that the Secretary of Interior was imposed upon concerning this matter, nor is there any allegation in the bill that the Kern River Company is not using the right-of-way for purposes of a public nature.

The entire theory of the bill, as shown by all its allegations, is unmistakably to the effect that the United States contended that the application was granted solely for irrigation purposes or for irrigation with the subsidiary purpose of development for power. If it was intended on behalf of the United States to present in this bill the question of fraud on behalf of the defendant in securing a right-of-way for a canal for purposes of a public nature, it certainly was the plain duty of the Attorney General to so allege and present

that issue. The bill alleges that the defendant is not using the right-of-way for irrigation, but it does not allege anywhere that the right-of-way is not used for purposes of a public nature; nor, as heretofore stated, is there any allegation in the bill concerning the use to which the company is putting the right-of-way. Elemental principals of pleading require that such an issue be presented with full opportunity of the company to rebut the same if it was desired to forfeit the right-of-way for that reason. (United States v. Safe Investment Gold Mining Co., 258 Fed. 872, 879; Wall v. Parrott Silver & Copper Co., 244 U. S. 407.)

It is too clear for argument that the proof on behalf of the Kern River Company and the preparation of its case might have been entirely different if such an issue had been fairly presented at the time of the trial. The same is true of the argument made and apparently acquiesced in by the learned United States Circuit Court that the Secretary of Interior misapprehended the law when he approved the application.

If this issue was deemed a material one, it should have been alleged and facts in support of it given in the bill. Undoubtedly when the Kern River Company made its application for a right-of-way for public purposes it meant that it desired that right of way for exactly those

purposes, and this was of necessity the conclusion of the trial court in view of the fact that the bill was dismissed. Undoubtedly the Secretary of the Interior was fully aware of the fact at the time of the final certificate that the defendant was desirous of taking advantage of that provision of the law authorizing a grant to be used for purposes of a public nature.

In any event, we believe it may fairly and safely be said that this issue was not tendered by the bill and that in view of the fact that section 2 of the Act of May 11, 1898, provided for the granting of a right-of-way for such a purpose prohibits a forfeiture of the right-of-way of the company without an issue upon this phase of the statute having been presented and determined. The trial court did not, and could not, under the issues as presented, have made a finding upon the question of the right-of-way not being used for purposes of a public nature, as heretofore stated. The opinion of the district court rendered February 10, 1919, in dismissing the bill, has not been officially printed, and for that reason we cannot refer this court to the full and convincing opinion rendered dismissing the bill.

Other than by rather vague allegations of misrepresentation and concealment contained in the bill, all of which are denied by appellant Kern River Company, it is submitted that there are no facts or circumstances from which any fraud

on the part of appellant can reasonably be inferred. There is no evidence of any sort that anyone connected with the Department of Interior was ever deceived as to the intended use of the right-of-way. It lay within the power of the plaintiff in support of the bill to produce evidence that the Department of Interior had been deceived or misunderstood the clear representations of appellant. One will look in vain for any misrepresentation, direct or indirect, on the part of appellant in obtaining the right-of-way.

Fraud is never presumed. On the contrary, fair dealing is the normal presumption and the burden of proving fraud or misrepresentation lies with the party alleging it. It cannot be assumed that merely because the form of the certificate by Kern River Company was changed to cover "purposes of a public nature" after the Act of May 11, 1898, became effective, that this of itself was any evidence of fraud on its part.

It seems immaterial, so far as any fraud or mistake is concerned, that in an earlier letter the department stated that the use under the Act of 1891 ought to be for irrigation purposes only. If on further correspondence and consideration, the Department of Interior thereafter changing its opinion issued a permit and made the grant upon the ground of its being certified for use for purposes of a public nature, it certainly cannot be said that this amounted, as a matter of

law, and as an irresistible inference from the facts, that fraud had been practiced upon the Department of Interior. *Especially is this true, in view of the fact that there is not a particle of evidence that anyone connected with the Department of Interior was ever deceived or ever failed to understand the use to which the appellant intended to put its rights of way.*. Fraud or mistake certainly requires evidence of a more substantial character to prove their existence with that degree of certainty which the law requires. The right of way was granted. It was used for many years. Finally it is decided that the Department of Interior could not have understood the plain purport of simple language and a bill is brought without authority of Congress to forfeit and prevent the use of the right-of-way which was lawfully, fairly and openly acquired.

The bill did not charge that appellant was not using the right of way for purposes of a public nature and this, it must be remembered, was the final certificate by the officers of the Kern River Company which the Department of Interior acted upon, and with which we must now assume they were satisfied after knowing the precise purpose for which the appellant intended its right-of-way. There is no evidence to the contrary and certainly the United States in a bill based on fraud and misrepresentation must meet

the burden of proof in a manner similar to any other party plaintiff.

Upon the most favorable view possible, the case on behalf of the United States made in the district court as disclosed by the record before this court falls far short of establishing a case of fraud or misrepresentation. It is stated in the opinion of the learned judge of the Circuit Court in reversing the decree of the District Court that the certificate of the Kern River Company that the right-of-way was intended for purposes of a public nature "was intended to and did convey to the department the impression that the right-of-way was authorized by the acts referred to, and was likewise false." With all due respect to the learned Circuit Court, it is submitted that there is no evidence, direct or indirect, in the record, or can any reasonable inference from the stipulated facts be made, which can be pointed at as supporting the conclusion there made. On the contrary, considering the vigilance of the Department of Interior shown by the correspondence between the parties, the evidence points unmistakably to the clear conclusion that the Department of Interior knew exactly what it was doing when it granted the right-of-way.

As we have heretofore stated, the bill of the United States in this action is based mainly upon the ground that fraud was perpetrated upon the Department of the Interior. Has then

fraud been proved in this case by that character and quantity of evidence which is required by courts in such cases? It is an elementary principal that fraud is never presumed but must be proved by the one alleging it. In the case of Farrar v. Churchill, 135 U. S. 609, an action in equity between individuals regarding the sale of land concerning which there was a claim of fraudulent representation, the court, upon the point of fraud, states:

> "The general principals applicable to cases of fraudulent representation are well settled. Fraud is never presumed; and where it is alleged the facts sustaining it must be clearly made out. The representation must be in regard to a material fact, must be false and must be acted upon by the other party in ignorance of its falsity and with a reasonable belief that it was true. It must be the very ground on which the transaction took place, although it is not necessary that it should have been the sole cause, if it were proximate, immediate and material."

To the same effect is the case of Jones v. Simpson, 116 U. S. 609, where, in discussing the matter, this court states:

> "A further objection is made to the direction given by the court, 'that fraud is never presumed, but must be established by evidence.' Of the correctness of this proposition, or of its application to the case there should be no question; but counsel seemed to argue that the burden of proof was upon

> the plaintiff to show that he did not participate in the fraud now conceded to have been intended by the Howard Bros. Fraud is not so lightly imputed. While certain circumstances will give rise to an inference of fraud, yet the law never presumes it. It devolves on him who alleges fraud to show the same by satisfactory proof." * * * "As the trial court stated, 'the law presumes, in the absence of evidence to the contrary, that the business transactions of every man are done in good faith and for an honest purpose; and any one who alleges that such acts are done in bad faith, or for a dishonest and fraudulent purpose, takes upon himself the business of showing the same."

See also the case of United States v. Arrendonda, 6 Peters 691, at page 716.

It is also the well-settled rule that there is a presumption that a grant made as prescribed by law is valid. Peterson v. Jenks, 2 Peters, 216, where Chief Justice Marshall states the rule to be as follows:

> "In the case of Polk's Lessee v. Wend, 9 C. 87; 5 W. 293, this court decided that a grant raises a presumption that every prerequisite has been performed; consequently, that no negligence or omission of the officers of government anterior to its emanation can affect it."

The rule is the same even though the United States itself is the party plaintiff in an action to set aside grants or patents issued by its repre-

sentatives. In suits of such character the Government is subject to the same rules respecting the burden of proof, the quantity and character of evidence, and the presumptions of law and fact which attend suits by individuals. The burden is upon the Government to prove fraud by the most conclusive and convincing evidence in order to overcome the presumption which accompanies all patents and grants—that the grant or patent was made upon sufficient evidence and that the Government officials had complied with the law.

We quote at some length from the case of United States v. Iron Silver Mining Co., 128 U. S. 673, in which a bill in equity was brought by the United States against the Iron Silver Mining Company and others, to cancel two patents for alleged placer mining claims in Colorado. The bill for the cancellation of these patents alleged that they were obtained upon false and fraudulent representations that the land embraced by them was placer mining ground and contained no vein or lodes of quartz or other rock bearing gold or silver or other mineral and that the patentee had performed the work upon each tract required by law to enable him to enter it as a placer claim, whereas in fact the land was not placer mining ground but contained veins or lodes of quartz or other rock

bearing gold, silver and lead of great value, that all these facts were well known to the patentee on his application for the patent, and that the work required to enter the tracts as placer claims had never been performed. After stating that in actions of this sort the Government had the same right to demand a cancellation of a conveyance by the United States when obtained by false and fraudulent representations as a private individual under like circumstances, the court states:

> "In this respect the United States as a landed proprietor, stands upon the same footing with a private citizen. The burden of proof in such cases is upon the government. The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law had been complied with by the officers of the government charged with the alienation of public lands, can only be overcome by clear and convincing proof. In several cases recently before this court the character and degree of proof required to set aside a patent for land of the United States issued in due form by their officers, where they have had jurisdiction over the subject and have observed the various proceedings preliminary to its issue required by law, have been discussed and determined, and rules laid down which must control in future cases of the kind."
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> "In Maxwell Land Grant Case, which was before us at October term, 1886, this question received careful consideration, 121 U. S. 325, 379, 381. The court there said,

by Mr. Justice Miller: 'The deliberate action of the tribunals, to which the law commits the determination of all preliminary questions and the control of the processes by which this evidence of title is issued to the grantee, demands that, to annul such an instrument and destroy the title claimed under it, the facts on which this action is asked for must be clearly established by evidence entirely satisfactory to the court, and that the case itself must be within the class of causes for which such an instrument may be avoided.' And again, 'We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases the respect due to a patent, the presumptions that all the preceding steps required by law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them, should only be successful when the allegations on which

this is attempted are clearly stated and fully sustained by proof."

"In Colorado Coal Company v. United States, 123 U. S. 407, before us at October term, 1887, the same subject was considered, and a similar conclusion reached, as to the character and degree of proof necessary to invalidate a patent of the United States. There patents for coal lands were alleged to have been obtained on false and fraudulent papers made by the register and receiver of the local land office combining with others in a conspiracy for that purpose; but the court, after referring to the doctrine declared in Maxwell Land Grant Case, said, by Mr. Justice Matthews: 'It thus appears that the title of the defendants rests upon the strongest presumptions of fact which, although they may be rebutted, nevertheless can be overthrown only by full proofs to the contrary, clear, convincing and unambiguous. The burden of producing these proofs and establishing the conclusion to which they are directed rests upon the government. Neither is it relieved of this obligation by the negative nature of the proposition it is bound to establish.' Authorities are then cited to show that in some instances the burden of proving a negative rests upon the complaining party; and especially so where the negative allegation involves a charge of fraud against the party whose conduct is complained of, for which it is sought to defeat an estate."

Following this, the court discusses the evidence in the case and in summing it up states:

"We have gone over with great care all the testimony adduced by the government in

> the case; and our conclusion is that it wholly fails to substantiate the charges of false and fraudulent representations to obtain the patents, or of a conspiracy by the patentee and others to defraud the government. We perceive nothing in what was said or done by him, or by those who advised and assisted him, which justifies the imputations of the government upon his or their conduct."

The same rule was later enunciated with the citation of many supporting cases, by Mr. Justice Brewer in the case of United States v. Stinson, 197 U. S. 200, 49 Law. Edition, page 724, a suit brought in the Circuit Court of the United States for the Western District of Wisconsin to set aside and cancel patents for land on the ground that they had been acquired by false and fraudulent representations on the part of the patentee, Mr. Justice Brewer, in delivering the opinion of the court, states:

> "While the government, like an individual, may maintain any appropriate action to set aside its grants and recover property of which it has been defrauded, and while laches or limitations do not of themselves constitute a distinct defense as against it, yet certain propositions in respect to such an action have been fully established. First the respect due to a patent,—the presumption that all the preceding steps required by law have been observed before its issue. The immense importance and necessity of the stability of titles depending upon these official instruments demand that suits to set

aside and annul them should be sustained only when the allegations on which this is attempted are clearly stated and fully sustained by proof. Maxwell Land-Grant Case (United States v. Maxwell Land-Grant Co.), 121 U. S. 325, 30 L. ed. 949, 7 Sup. Ct. Rep. 1015; Colorado Coal & I. Co. v. United States, 123 U. S. 307, 31 L ed. 182, 8 Sup. Ct. Rep. 131; United States v. San Jacinto Tin Co., 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850; United States v. Des Moines Nav. & R. Co., 142 U. S. 510, 35 L. ed. 1099, 12 Sup. Ct. Rep. 308; United States v. Budd, 144 U. S. 154, 36 L. ed. 384, 12 Sup. Ct. Rep. 575; United States v. American Bell Teleph. Co., 167 U. S. 224, 42 L. ed. 144, 17 Sup. Ct. Rep. 809.

"Second. The government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual. 'It should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful. Maxwell Land-Grant Case (United States v. Maxwell Land-Grant Co.)' 121 U. S. 325, 381, 30 L. ed. 949, 959, 7 Sup. Ct. Rep. 1015; United States v. Iron Silver Min. Co., 128 U. S. 673, 677, 32 L. ed. 571, 573, 9 Sup. Ct. Rep. 195; United States v. Des Moines Nav. & R. Co., 142 U. S. 510, 541, 35 L. ed. 1099, 1108, 12 Sup. Ct. Rep. 308."

In concluding its opinion the court states:

"Further, the circuit court, on its review of the testimony, found that there was no

> fraud, and decreed a dismissal, and that finding and decree were approved by the court of appeals. While such a finding is not conclusive upon this court, yet it is entitled to great consideration, and should not be disturbed unless plainly against the testimony."

In the above case, the action was brought in the first instance in the Circuit Court, which, therefore, was the trial court, and it was the decision of the trial court, also concurred in by the Court of Appeals, on the facts of fraud and misrepresentation which is given great weight. In this respect it is analogous to the case at bar in which the District Court, being the trial court, hearing the evidence, decided that no fraud or misrepresentation had been perpetrated upon the Government and dismissing the bill for that reason. The fact that the Circuit Court took a different view would not, we submit, change the rule.

The case of Moffatt v. United States, 112 U. S. 24, an action brought by the United States to cancel two patents for land in Colorado on the the ground that the patentees named were fictitious parties and that no settlement or improvement on the lands were ever made and that the documents alleging settlement and improvement were fabricated by the register and receiver of the land office of the district embracing the land covered by the patent, is entirely consistent with

the two cases heretofore cited. This case is discussed in the case of United States v. Iron Silver Mining Co., 128 U. S. 673, at page 678.

We submit that in view of the rule established by this court in numerous cases, expressed in the cases heretofore cited, that it will be found upon a careful examination of the record in the case, that there is no evidence of the character required in proof of the alleged fraud. As we have heretofore stated, there is no evidence or proof of any character that the land office officials were in fact deceived or that they ever misunderstood the intention or the purpose of the Kern River Company in its certifications upon the maps which were filed with the land office for approval. This proof is entirely wanting and is, it is submitted, indispensable in an action of this character based upon fraud, where fraud is not to be lightly presumed.

This situation was presented in the case of the United States v. Safe Investment Gold Mining Co., 258 Fed. 872, decided by the Circuit Court of Appeals, Eighth Circuit, May 19, 1919. The suit was brought to cancel, upon the ground of fraud, a patent issued by the United States covering certain lode mining claims, the fraud alleged being that false representations were knowingly made to the officers of the United States General Patent Office at the time of the application for the patent. Much testimony was

taken in the case and upon the trial the bill was dismissed upon the merits for want of equity.

The court first states the rules of law applicable to actions by the United States to cancel patents on the ground of fraud, quoting at length from the case of United States v. Stinson, 197 U. S. 200, heretofore cited and quoted in this brief to the effect that the United States, like every individual, must bear the burden of proof required in cases of fraud to overcome the presumption of the validity of grants and patents given by the Government. It was alleged in that case, in the plaintiff's bill, that the Government officials were deceived and believed and relied upon the false misrepresentations made by the patentee. In discussing the proof adduced upon this point, the court states:

> "The questions here are whether the representations actually made by the defendant were willfully and knowingly false, and whether those representations were relied upon by the plaintiff. A careful consideration of the whole evidence leads to the conclusion that plaintiff has failed to establish the allegations of the bill in respect to those matters. In view of plaintiff's contention, set forth above, as to the meaning to be placed upon the statements in the application, *it was incumbent upon plaintiff to prove that the statements made by Webb in the application were capable of but one meaning, viz., the meaning now placed upon them by plaintiff, or at least that this meaning was in fact intended by Webb, and that*

> *the statements were also understood with the same meaning by the officials of the General Land Office.* Conceding, without deciding, that both of the above-stated requirements, contended for by plaintiff, as to mineral value of the land were necessary prerequisites to the issuance of a patent, and that such requirements had not been met, still the fraud alleged lacks proof. First, there is no evidence that the officials of the Land Office believed that such requirements were necessary, or that the language of the application was intended to make such representations." (Italics are ours.)

This citation is squarely appropriate to the claims made in this case. That the Department of Interior was ever deceived can only be indirectly inferred from the evidence in the record. There is no direct testimony bearing upon this point and no facts, or inference from facts stipulated to or agreed upon, which are not equally susceptible to the view of a fair disclosure and full knowledge on the part of the land officers as to the purpose for which the right-of-way was acquired. The presumption in favor of the validity of a grant by the United States is not to be overcome, it is respectfully submitted, by the character of evidence shown in this case.

II.

In the Absence of an Express Forfeiture Clause in the Act Under Which the Grant Was Obtained, or of Authority From Congress Declaring a Forfeiture, No Right to Sue for a Forfeiture Exists.

As we have heretofore seen, the District Court found against the contention of the plaintiff in all respects, so far as any active or constructive fraud or mistake of fact was concerned in obtaining the right-of-way in question. We now wish to present to this court the further proposition which, if we are correct in our contention, would entirely dispose of the case before this court and require a reversal of the decree of the Circuit Court of Appeals. That proposition is, as suggested by the heading, that where the provisions of the act of Congress under which the right-of-way was obtained do not provide for a forfeiture such as is claimed by the United States, and Congress itself has not authorized any action for such forfeiture, none can be brought. At the outset it is very important to again look at the act in question. For the convenience of this court we shall set forth several sections of the acts in question:

Chapter 561. An Act to repeal timber-culture laws, and for other purposes. Approved March 3, 1891.

26 U. S. Stats., at L., 1095, 1101-3.

* * * * * * * *

"Sec. 18. That the right-of-way through the public lands and reservations of the United States *is hereby granted* to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any state or territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: Provided, that no such right-of-way shall be so located as to interfere with the proper occupation by the government of any such reservation, and all maps of location shall be subject to the approval of the department of the government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective states or territories.

"Sec. 19. That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon

the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights-of-way shall pass shall be disposed of subject to such right-of-way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

"Sec. 20. That the provisions of this act shall apply to all canals, ditches, or reservoirs, heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps herein provided for.

* * * * * * * *

"That if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture."

Chapter 292. An Act to amend an act to permit the use of the right-of-way through public lands for tramroads, canals, and reservoirs, and for other purposes. Approved May 11, 1898.

30 U. S. Stats., at L., 404.

"Sec. 2. That the rights-of-way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the Act entitled 'An Act to

> repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights-of-way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation."

It will be observed from an examination of these sections that the only provision for forfeiture is contained at the close of section 20, where it is provided

> "that if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture."

The case, then, is vitally different from one in which the United States is seeking to enforce a forfeiture expressly provided for by Congress in the initial granting act, or by a special act of Congress after an alleged cause for forfeiture has come into existence. It is, of course, the position of appellant herein that no cause of forfeiture whatever exists, but regardless of the merits of that proposition it is our contention here that without express authority from Congress, either in the granting act or by subsequent provisions, no action for forfeiture will lie.

In the first place, it is well settled by the authorities that after the proper land officers have

approved the application, title passes and the land or right-of-way granted passes once for all beyond the power of the Secretary of the Interior or his successors to annul or revoke it for any cause whatever.

In the case of Noble v. Union River Logging R. R. Co., 147 U. S. 165, it was expressly held by the Supreme Court that a prior decision of the Secretary of the Interior in exercise of the powers conferred upon him by the Act of March 3, 1875, chapter 152, 18 Stat. 482, that a designated railway company is entitled to a right-of-way over public land, cannot be revoked by his successor in office, and further:

> "At the time the documents required by the Act of 1875 were laid before Mr. Vilas, then Secretary of the Interior, it became his duty to examine them, and to determine, amongst other things, whether the railroad authorized by the articles of incorporation was such a one as was contemplated by the act of Congress. Upon being satisfied of this fact, and that all the other requirements of the act had been observed, he was authorized to approve the profile of the road, and to cause such approval to be noted upon the plats in the land office for the district where such land was located. When this was done, the granting section of the act became operative, and vested in the railroad company a right-of-way through the public lands to the extent of 100 feet on each side of the central line of the road. Frasher v. O'Connor, 115 U. S. 102. * * *

"We think the case under consideration falls within this latter class. The lands over which the right-of-way was granted were public lands subject to the operation of the statute, and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide, and when decided, and his approval was noted upon the plats, the first section of the act vested the right-of-way in the railroad company. The language of that section is 'that the right-of-way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory,' etc. The uniform rule of this court has been that such an act was a grant *in praesenti* of lands to be thereafter identified. Railway Company v. Alling, 99 U. S. 463. The railroad company became at once vested with a right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose."

Noble v. Union River etc., 147 U. S. 156, 172, 176.

In the present case it is not only conceded but affirmatively alleged in the bill of complaint that the title to the right-of-way was granted or affirmed in the defendant company. In paragraph XI of the bill [Rec. p. 6], it is stated that on the 27th day of November, 1905, the Secretary of the Interior, "believing that said canal was to be used by said defendant for the main purpose of irrigation and not otherwise, ap-

proved, subject to all valid existing rights, said application for said right-of-way for the canal"; further, "and by reason of the said approval of said application there was granted to the said Kern River Company a right to the use of the right-of-way in said application." It is further affirmatively alleged, at the close of paragraph IX [Rec. pp. 5, 6], "that construction was commenced on the 31st day of July, 1902, and completed on the 5th day of April, 1904."

In the somewhat earlier case of Moore v. Robbins, 96 U. S. 530, the Supreme Court of the United States held that a patent for public land, when issued by the land department acting within the scope of its authority and delivered to and accepted by the grantee, passes the legal title to the land, and all control of the executive department of the government over the title thereafter ceases.

> "While conceding for the present, to the fullest extent, that when there is a question of contested right between private parties to receive from the United States a patent for any part of the public land, it belongs to the head of the land department to decide that question, it is equally clear that when the patent has been awarded to one of the contestants, and has been issued, delivered, and accepted, all right to control the title or to decide on the right to the title has passed from the land office. Not only has it passed from the land office, but it has passed from

the executive department of the government. * * *

"But in all this there is no place for the further control of the executive department over the title. The functions of that department necessarily cease when the title has passed from the government. And the title does so pass in every instance where, under the decisions of the officers having authority in the matter, a conveyance, generally called a patent, has been signed by the President, and sealed, and delivered to and accepted by the grantee. *It is a matter of course that, after this is done, neither the secretary or any other executive officer can entertain an appeal. He is absolutely without authority.*" (Italics are ours.)

Moore v. Robbins, 96 U. S. 530, 532, 533-534.

See also:

Beley v. Naphtaly, 169 U. S. 353-365.

It being thus established, both by the allegations in the bill and by the settled law, that the title to the right-of-way is now in the appellant and forever beyond the authority of the highest officers of the government in the land department to revoke it, it is difficult to see, in view of this doctrine, how an action such as is here brought can be successfully maintained without the authority of Congress, the sole granting power representing the United States.

As we have seen, there is no provision in the act under which the grant was obtained for a forfeit-

ure such as or similar to that claimed in the bill. As heretofore stated, the only provision for forfeiture pertains to the incompletion of the canal or ditch within five years after the location of the right-of-way. The purpose of this proviso is manifest. It clearly shows that the government was desirous of a speedy completion of the work in question; that its lands should not be needlessly withdrawn from the public and allowed to remain so while the work in question, which was deemed to be for the benefit of the public, was uncompleted.

Under the well-established rule of statutory construction, no other ground of forfeiture being mentioned in the act, all others are of necessity excluded. It is, of course, for the United States alone to determine what causes it deems a sufficient ground for forfeiture, and it is not within the authority of the Department of the Interior, through its officers, or even the judicial power of the courts, to read into the acts grounds for forfeiture which are not there specified. It is too well settled to require citation of authorities that forfeitures are not favored in law, much less in courts of equity. Conditions which are not expressed with the utmost preciseness and explicitly declared to be forfeitures are never construed as such. The act under which this right-of-way is alleged to have been acquired does not contain any provision what-

ever in relation to the right of forfeiture as claimed in this bill. A reading of the complete act conclusively establishes this position.

Assuming that any right of forfeiture exists in the government, it must be declared by the United States or someone on its behalf expressly given authority to do so. We have seen in the cases heretofore cited that all control over land granted passes from the hands of the Secretary of Interior and other land officers. The Congress of the United States is then the only body which can declare a forfeiture and order its enforcement through the proper channels in the courts. No claim is made in the bill that an act of Congress has declared a forfeiture in this case; certainly not for any grounds set out in the bill. The bill declares in paragraph XVIII that on the 27th of March, 1908,

"Plaintiff's then Secretary of the Interior, through the register and receiver of plaintiff's local land office, at said Independence, served notice upon said defendant Kern River Company to show cause within ninety days from date of said notice why proceedings should not be instituted to cancel said grants of right-of-way upon the ground that the same were secured by the approval of said maps for the main purpose of irrigation, but were used solely for power purposes."

That on November 18th, 1909, the assistant commissioner of plaintiff's general land office served a similar notice. There is then no state-

ment in the bill that Congress has ever declared a forfeiture or instructed, by proper legislation, its land office to proceed to enforce such a forfeiture.

We are not without express authorities upon this question from the Federal courts of the United States. The case which the District Court deemed to be conclusive upon this point was that of United States v. Washington Improvement and Development Company, 189 Fed. 674. In that case the various decisions of the courts, together with the opinions of attorney generals and acts of Congress upon the subject, were carefully and ably reviewed by Judge Rudkin.

The bill was one brought by the Attorney General of the United States seeking to forfeit the right-of-way acquired by the defendant company for non-completion and for failure to commence work within the time specified in the granting act. It was even expressly provided in section 5 of the act under which the right-of-way was obtained that the rights therein granted should be forfeited by the company unless at least twenty-five miles of the railroad should be constructed through the reservation within two years after the passage of the act.

The bill alleged the failure to comply with the provisions of the act, and, further, that the United States elects to forfeit all rights and

privileges granted under the act of Congress by reason of the failure on the part of defendants to comply with the terms thereof, and the prayer of the bill was that the rights and privileges granted to the defendants and each of them be declared forfeited to the United States. The defendants demurred to the bill on the ground "that said proceeding is instituted and said bill of complaint is filed without any lawful authority therefor."

We shall quote from the opinion of the court at some length because of the aptness of the authority and the careful and able discussion and opinion rendered in the case. As stated by the court:

> "The question is thus presented whether the United States may maintain a suit in equity to forfeit a land grant such as this for breach of a condition subsequent, in the absence of a declaration of forfeiture by Congress, or express authority from Congress for the institution of such a proceeding." (Page 675.)

Further the court states:

> "But the question still remains, Has a right of action accrued in favor of the government under the facts set forth in the bill? The opinions of the different Attorneys General, the declarations of the Supreme Court of the United States, the legislation of Congress, and the practice of all departments of the government through a long series of years convince me that no such right exists." (Page 676.)

The court cites with approval the opinion of Attorney General Devens as follows:

> "'I am, therefore, of opinion that the grant to the railroad has not been forfeited by its failure to build its road within the time named in the act, *no action, by reason of its failure to perform the conditions, having been taken by authority of Congress.* It having, then, a present grant, even if it be treated as one liable to forfeiture, it has still a right to proceed to construct the road, and, until in some form advantage shall be taken of the breach of the conditions, *it would be the duty of the executive department to give it the benefit of the grant.*'" (Page 677.)

Further, from the opinion of Attorney General Garland, as follows:

> "'While it is very plain from the language of the grant that Congress intended to donate the land for the specific purpose designated therein, namely, to be used "as a site for the public building of said county," yet, whether this annexes a *condition* to the grant, or creates a mere *trust*, is not so clear. If a condition, upon breach thereof the grant would be liable to forfeiture. If a trust, the same result would not follow upon a breach, but the aid of a court of equity might be invoked by proper parties to effectuate the trust. * * * In the former case I submit that, in the absence of any law of Congress declaring the forfeiture or directing the institution of proceedings to that end, no authority exists to bring a suit in behalf of the United States to recover the land on the ground of failure to perform the condition.'" (Page 677.)

The court states further that:

> "While the Supreme Court of the United States has not passed upon this question as explicitly as we might wish, yet the language of the court in many decided cases is in entire harmony with the views of the Department of Justice. Thus in United States v. Repentigny, 5 Wall, 211, 268, the court said:
>
> " 'The mode of asserting or of assuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly, under the authority of the government, without these preliminary proceedings.' " (Page 678.)

The court cites with approval the case of St. Louis etc. Co. v. McGee, 115 U. S. 469, where this court said:

> "It has often been decided that lands granted by Congress to aid in the construction of railroads do not revert after condition broken until a forfeiture has been asserted by the United States, either through judicial proceedings *instituted under authority of law for that purpose, or through some legislative action legally equivalent to a judgment of office found at common law. * * * Legislation to be sufficient must manifest an intention by Congress to reassert title and to resume possession.*" (Pages 678-79.) (Italics are ours.)

The case of United States v. Northern Pacific etc. Co., 177 U. S. 435, which will be later considered, is also cited, as well as many other similar cases.

The court next states that:

> "The legislation of Congress leads me to the same conclusion. That body has at all times acted in conformity with the opinions of the different Attorneys General, and has assumed that land grants can only be forfeited for breach of conditions subsequent by direct legislative act or by judicial proceedings expressly authorized by law." (Page 680.)

The court, in considering the question of forfeiture and its disfavor in courts of equity, quotes from the highest authorities

> "It is a significant fact that a court of equity could not decree a forfeiture, such as was declared by Congress in any of the instances cited, without express legislative authority therefor. That court has no legislative or dispensing power. It must administer justice according to fixed rules. It can only determine whether there has been a substantial breach of the conditions, and, if that fact is established, it must forfeit the grant in its entirety, unless Congress has ordained otherwise. In fact, it has been said by the highest authority that a court of equity will never lend its aid to enforce a forfeiture for breach of a condition subsequent. 'It is a universal rule in equity never to enforce either a penalty or forfeiture. Therefore courts of equity will never aid in the devesting of an estate for a breach of a covenant or a condition subsequent, although they will often interfere to prevent the devesting of an estate for a breach of a covenant or condition.' Story's Eq. Jur. (13th Ed.), Sec. 1319. 'It is a well-settled and familiar doc-

trine that a court of equity will not interfere on behalf of the party entitled thereto, and enforce a forfeiture, but will leave him to his legal remedies, if any, even though the case might be one in which no equitable relief would be given to the defaulting party against the forfeiture.' Pomeroy's Eq. Jur. (3d Ed.), Sec. 459. 'Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either.' Marshall v. Vicksburg, 15 Wall. 146, 149, 21 L. Ed. 121. 'Equity abhors forfeitures, and will not lend its aid to enforce them.' Jones v. Guaranty & Indemnity Co., 101 U. S. 622, 628, 25 L. Ed. 1030. 'Nor will the court be induced to depart from its uniform course, and take cognizance of that question because the jurisdiction is sought on the ground of removal of clouds from the title; for the right of the complainants to a dispersion of the cloud is dependent upon a favorable adjudication of the first proposition, *viz.*, that they are owners of the estate, by reason of a breach of the condition.' M. & C. R. R. Co. v. Neighbors, 51 Miss. 412. Whether the rule is stated too broadly by these authorities we need not inquire, for I am convinced that a court of equity will not lend its aid to enforce a forfeiture in a case such as this, in the absence of legislative authority defining its powers and prescribing the mode of their exercise." (Pages 680, 681.)

The language of the court in concluding is as follows:

"Conceding to the President and to the department of justice the full measure of

their constitutional authority, if I am correct in the conclusion that 'the mode of asserting or of assuming the forfeited grant is subject to the legislative authority of the government' (United States v. Repentigny, *supra*), that the forfeiture of a public grant must be asserted by legislative act, or 'by judicial proceedings authorized by law' (Schulenberg v. Harriman, *supra*), or 'through judicial proceedings instituted under authority of law for that purpose' (St. Louis etc. Ry. Co. v. McGee, *supra*), and that a bill which does not allege 'that it is brought under authority of Congress for the purpose of enforcing a forfeiture, and does not allege any other legislative act whatever looking to such intention,' fails to state a cause of action (United States v. N. P. R. R. Co., *supra*), *it must follow that until Congress acts there is no law for the President to execute or for the courts to administer.* I think the case is rather controlled by the provision of the Constitution which declares that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States (article 4, section 3). It is universally conceded that only the grantor or successors can take advantage of the breach of a condition subsequent, and, while in this case the government is nominally the grantor, the actual grantor is the Congress of the United States. And in my opinion a grant made by that body must remain of full force and effect until Congress ordains otherwise." (Italics are ours.)

United States v. Washington etc. Co., 189 Fed. 674, 682.

We have quoted at length from this case for the reason that we believe it is perhaps more convenient for this court, than to merely refer to the volume where the case was decided. It will be observed that the Washington case was a stronger one for permitting a forfeiture than is the case now before this court, for the reason that the act in question expressly provided that the right-of-way would be forfeited unless constructed within the time limited in the act. This important element is lacking in the present case. There was no contention that the appellant Kern River Company did not complete its improvements within the time required by the act. If, then, the courts do not feel justified in decreeing a forfeiture where the act itself expressly provides for such a forfeiture, how can it plausibly be contended that the Attorney General, from his own judgment as to a cause of forfeiture, has authority to proceed to attempt to attain it?

The case of United States v. Whitney, 176 Fed. 593, relied upon by the plaintiff at the argument before the District Court and before the Circuit Court, was considered in the later Washington case, and was disapproved of, but even in the Whitney case the forfeiture sought was one expressly provided for in the act under which the right-of-way was obtained, namely, section 20 of the Act of March 3, 1891. A

further decision in line with the Washington case is that of United States v. Tenn. & C. R. Co., 71 Fed. 71, where the court holds that the condition in the Act of June 3, 1856, granting public lands to the state of Alabama in aid of the construction of certain railroads, that if any one of said railroads is not completed within ten years, no further sale shall be made, and the lands unsold shall revert to the United States, could only be enforced by congressional action. With regard to the right to declare and enforce a forfeiture, the court aptly states:

> If the government of the United States, through its legislative body, takes no action to enforce the condition in the granting act to these lands, then by what right or authority can this suit be maintained? If it be correct that the lands in question are not within the terms of the forfeiture act, then how is it shown that it ever was the purpose of Congress to insist on any forfeiture contained in any provision of the act? On the contrary, does it not show that no such purpose was ever entertained, because never put into execution by any legislative act? It may be, and indeed the language used in the forfeiture act cited *supra* indicates, that the lands in question may have been purposely excluded from the terms of that act, and who shall say that the Congress did not find ample reason why the construction of the railroad had been so long delayed, and why the forfeiture should not apply to it? Congress may have been influenced by the condition

of the country for a portion of the time between the passage of the granting act and the final completion of the road. The intervention of the recent war may have had an influence upon this legislation; but, whatever it may have been,—and the motive which influenced Congress is not open to question here,—*it is sufficient to say that, in the absence of congressional action as to the grant of these lands, there are no proper grounds upon which this bill can be maintained.* It is clear implication from the action of Congress in the forfeiture act, September 29, 1890, that the Congress did not intend to insist on any condition subsequent which existed in the granting act.

"It is to be noted in this connection that, at the date of the passage of the forfeiture act, the said railroad, as contemplated in the granting act from Guntersville, on the Tennessee River, to Gadsden, on the Coosa, was in process of construction, nearing completion, and was in fact completed, and in actual operation before this bill was filed." (Italics are ours.)

U. S. v. Tenn. etc. Co., 71 Fed. 71, 73-74.

There, as here, the work for which the right-of-way was obtained was completed and in actual operation before the bill was filed. In the often quoted case of Schulenberg v. Harriman, 21 Wall. 44, 62, the court states:

"The provision in the Act of Congress of 1856, that all lands remaining unsold after ten years shall revert to the United States, if the road be not then completed,

is no more than a provision that the grant shall be void if a condition subsequent be not performed." (P. 62.)

Citing from Sheppard's Touchstone, proceeding further the court declares:

"And it is settled law that no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs, or the successors of the grantor if the grant proceed from an artificial person; and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point, with hardly an exception, are all one way from the Year Books down. And the same doctrine obtains where the grant upon condition proceeds from the Government; no individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed.

"In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. If it be a private grant, that right must must be asserted by entry or its equivalent. If the grant be a public one it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and

appropriation of the property, or that it be offered for sale or settlement."

Schulenberg v. Harriman, 21 Wall. 44, 63-64.

In our opinion, taken in connection with the statute under which the right-of-way in the case before this court was acquired, these authorities establish beyond question that a right to forfeiture, assuming that such a right exists, can only be declared by the United States through an Act of Congress or through legislation expressly authorizing a forfeiture to be enforced in the case in question. Without such, no authority exists in the Department of Interior or the Attorney General to declare and enforce such a forfeiture.

It is further to be noted in this connection that:

The bill shows that the Kern River Company entered upon the public domain and occupied the right-of-way and constructed its work thereon at great expense, and has used the property in serving the public since April, 1904, a period of almost nine years, as hereinafter stated in connection with the statute of limitations. All this time the Government has made no complaint through its officers or otherwise, and while we do not urge an estoppel *in pais*, in view of the decision in the case of United States v. Utah Power & Light Co., 243 U. S. 389, 61

L. E. 791, yet we consider that this case is fairly distinguishable from those cases in that the defendant companies in those cases were found *to be trespassers from the beginning*, and consequently were not in a position to evoke an estoppel or equitable claim of any kind, whereas the defendant here entered under claim of right and under a grant from the Secretary of Interior. It does appear by the bill (Amd. Bill, Par. XVIII) that the defendant was served with notice to appear before the Commissioner of the Land Office and show cause why proceedings should not be instituted to cancel the grant of the right-of-way, March 27th, 1908. Notwithstanding this notice the Government never brought a suit in relation to the right-of-way, until September 11th, 1914, when the original bill was filed.

The rule is that provisions in favor of forfeiture will be strictly construed even where the United States is seeking a forfeiture, and this is especially true where no material benefit is to be received by the Government in virtue of an enforced forfeiture. See:

United States v. Washington etc. Co., 189 Fed. 674,

heretofore quoted from at length.

If our position is correct as relating to forfeiture, and we are persuaded by the authorities that it is, then the grant vested the title to the

right-of-way in the Kern River Company and placed it beyond the control of the department. Then, as forfeitures are not favored, a liberal construction of the Act of March 3rd, 1891, should be given, and especially in view of the fact that the theory of the bill is an attempt to change the grant from an absolute grant of the right-of-way, conditioned only upon the construction of the works and the operation of the same to a limited right under the Act of February 15th, 1901 (31 U. S. Stats. at L. 790), under which the department grants rights-of-way for limited periods, and makes charge for the use of the portion of the public domain occupied.

Because of the wealth of authority cited and the general soundness of its conclusion, we believe that the reasoning of the Washington Improvement case is unanswerable. With Congress alone must rest the right to say when it shall declare and enforce such a forfeiture. We do not have here even the usual situation where the act itself provides for a forfeiture of the kind sought by the plaintiff. The fact that it does provide for other kinds of forfeitures is very persuasive that a forfeiture such as is sought by plaintiff was excluded. A forfeiture sought to be imposed long after the grant has become perfected and long after the work in question has been completed is very different from those forfeitures for failure to complete work within

a specified time. There the cause of forfeiture is made at the beginning of the relationship and before valuable rights have attached, and where no great inequity would result, and it is no doubt proper that the conditions should be strictly enforced.

This situation precisely illustrates the distinction between those classes of cases where the forfeiture is for the failure to complete the work in question within a time limit and cases similar to the present case and the Washington Improvement Company case. This court should not deny the United States through the Congress the right to consider the alleged misuser claim from its own equitable point of view, and if Congress itself does not attempt to enforce such a forfeiture, it should not be enforced. Congress alone should be looked to for a declaration of forfeiture.

The case of Union Land and Stock Company v. United States, 257 Fed. 635, relied upon by plantiff in the court below, is similar to the Whitney cases and is distinguishable from the present case, in that the act there in question expressly provided for a forfeiture and the forfeiture sought was within the class named in the act. We are not here contending that a grantor cannot forfeit a grant where it expressly provides for forfeiture for breach of conditions subsequent. If Congress itself had

declared a forfeiture for the alleged breach in question in this case, these authorities and such discussion would be relevant.

In the case of United States v. Oregon and C. R. Co., 186 Fed. 861, in which Congress made a grant of lands in Oregon and California, in aid of the construction of a railroad and telegraph line, a specified section of the road to be completed each year and the whole within a fixed time, and providing that if the company should fail to comply with its conditions by filing its assent, etc., the act should be null and void, the court dealt with the right of the Attorney General to bring an action. The condition of the construction within the time limited was held to be a condition subsequent. The authority of the Attorney General to bring the action was based upon a joint resolution of Congress of April 30, 1908, wherein the Attorney General of the United States was authorized to institute and prosecute any and all suits in equity, actions at law or other proceedings to enforce any rights or remedies of the United States growing out of either of said acts of Congress under which the lands were granted. Congress did not itself declare a forfeiture and expressly disclaimed any intention of prejudging the case before a decision was reached by the court, but as stated by the court, page 932:

> "But it is equally plain that it did authorize the Attorney General to institute such

> suit, action or proceeding as he might deem appropriate to determine the vital question as to whether a forfeiture has been incurred."

Again, page 933:

> "While Congress has not declared a forfeiture, leaving the judicial inquiry to force it has clothed the Attorney General with ample authority to institute a suit to determine whether forfeiture has been incurred or not and the action being such that equity may entertain jurisdiction of the cause there remains no reason why it should not be maintained."

On appeal to the United States Supreme Court the decision of the Circuit Court of Oregon was reversed in so far as it held that the provision requiring a sale of land to actual settlers at a maximum price and amounts was a condition subsequent for which the grant was forfeited. With regard to the resolution of Congress authorizing the Attorney General to prosecute the suit, the Supreme Court stated:

> "The Attorney General was empowered to assert all rights and remedies existing in favor of the United States," etc.

Further:

> "Being so authorized the United States brought this action as complainant against the Oregon and California Railroad Company."

It will thus be noted from the foregoing case that both the Circuit Court and the United

States Supreme Court emphasized the fact *that Congress by its joint resolution had authorized the Attorney General to enforce whatever rights of forfeiture the United States had in connection with the grant.* It is apparent that if Congress had believed that authority already rested in the Attorney General to seek such forfeiture, no such joint resolution would have been enacted. The fact that such a resolution was sought and obtained expressly empowering the Attorney General to sue indicate very clearly that Congress deemed such an authority necessary.

It is common for Congress in similar acts to expressly authorize the Attorney General to take the necessary steps to enforce a forfeiture which the United States is entitled to.

24 Stats. at L., page 556, chapter 376:

> "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands and for other purposes."

The act provides that if the land has, for any cause, been erroneously certified or patented, it shall be the duty of the Secretary of the Interior to demand from such grantee company a relinquishment or reconveyance to the United States of all such lands.

> "And if such company shall neglect or fail to so reconvey such lands to the United

> States within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney General to commence and prosecute, in the proper courts, the necessary proceedings to cancel all patents, certifications, or other evidence of title heretofore issued for such lands, and to restore the title thereof to the United States."
>
> 24 Stats. at L., p. 637.

In this act, dealing with the forfeiture and escheat to the United States of property of corporations obtained or held in violation of an earlier act of the United States (12 Stats. at L. 501), forbidding the holding of property in excess of the value of fifty thousand dollars by religious corporations in any territory, it is expressly provided

> "that it shall be the duty of the Attorney General of the United States to institute and prosecute proceedings to forfeit and escheat to the United States the property of corporations obtained or held in violation of section 3 of the act approved the 1st day of July, 1862," etc.
>
> 24 Stats. at L., p. 476.

This act restricts the ownership of real estate in the territories to American citizens, etc., and provides for a forfeiture for a violation of the statute. It is expressly made a duty of the Attorney General to enforce every such forfeiture by the proper proceeding, the wording of the statute on this point being as follows:

> "That all property acquired, held or owned in violation of the provisions of this act shall be forfeited to the United States, *and it shall be the duty of the Attorney General to enforce every such forfeiture by bill in equity, or other proper process.*" (Italics are ours.)
>
> 20 Stats. at L., p. 60.

This act deals with land grants to railway companies in aid of construction. It provides that if the railroads fail to perform the acts required, for a period of six months, such failure shall operate as a forfeiture (Sec. 11), "and it shall be the duty of the Attorney General to cause such forfeiture to be judicially enforced."

Congress would not, of course, expressly authorize and empower the Attorney General to enforce such forfeiture if he had such right and power in the first instance. It clearly shows the purpose of Congress to alone control its right to declare forfeitures. We believe that such authority from Congress was equally necessary in the present case and without it the right of the plaintiff to sue has not been shown and that the decision of the trial court in this case with respect to this point must be affirmed.

III.

The Suit Was Barred by the Statute of Limitations Contained in the Act Under Which the Grant Was Obtained.

Section 8, Act of March 3, 1891, 26 Stats., page 1099, provides:

> "That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

At the outset of the discussion of our position here, it is important to note that this statute of limitations is a part of the same act under which the Kern River Company obtained its grant of the right-of-way sought to be annulled. It has been the contention of plaintiff that this statute of limitations did not apply to grants of right-of-way obtained for purposes of irrigation, or for purposes of a public nature. This view was followed by the Circuit Court. It is our contention that this act does expressly apply to the action here sought to be maintained, brought more than six years after the final application was approved, and furnishes an additional and independent reason why the decision of the trial court appealed from must be affirmed. The answer [Rec. p. 22, par. II] pleaded the statute of limitations. The trial

court was reluctant to dispose of the case upon the technical ground of the statute of limitations and for that reason preferred to base its decision upon the merits of the case, rather than on the statute of limitations. The act in question of March 3, 1891, 26 Stats. 1095, consists of twenty-four sections. Section 18 of the act provides for the acquirement of rights-of-way and is the one under which the Kern River Company applied for and obtained its grant. Section 8 of the same act contains the six-year statute of limitations provision above quoted. Section 20 of the act, so far as here material, provides:

> "That the provisions of this act shall apply to all canals, ditches, or reservoirs, heretofore or hereafter constructed, whether constructed by corporations, individuals or association of individuals on the filing of the certificates and maps herein provided for."

In view of this express declaration that the provisions of this act apply to canals, ditches, or reservoirs, it seems conclusive to us that section 8, containing the statute of limitations, must apply to such canals, ditches and rights-of-way, otherwise section 20 is so limited as to make it a useless provision. An examination of the act is convincing proof that the claim of plaintiff that the statute of limitations only applies to a narrow field of patents where the

fee is conveyed is without foundation. This alone would seem to us ample ground for holding that the six-year statute of limitations applied to the suit brought by plaintiff in this case.

We are, however, not left to a mere examination of the act upon this question. We believe that the authorities bear out our position that the statute of limitations applies to this action brought more than six years after the application was finally approved and many more years after first obtained, and that it furnishes an additional reason upon which the decision of the trial court could have been placed. It was, of course, desirable that the merits of the question regarding fraud and mistake of fact should have been decided and we believe that the trial court was correct in preferring to base its decision upon the merits rather than upon the more technical defense of the statute of limitations. *It is also to be noted that this is a self imposed statute of limitations expressly made a part of the act under which the right of way was obtained,* and for that reason the general rule that statutes of limitations are not to be invoked against the United States does not apply.

In the case of United States against Chandler Dunbar Water Power Company, 209 U. S. p. 446, a bill in equity was brought by the

United States to remove a cloud from its alleged title to two islands between Lake Huron and Lake Superior. The defendant stood by the statute of limitations above set forth. On this point, Mr. Justice Holmes declared as follows:

> "There is force in the contention of the United States that the land was reserved and that it had not been surveyed, but we find it unnecessary to state or pass upon the arguments, because we are of the opinion that now the patent must be assumed to be good. The statute referred to provides that 'suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act'—that is to say, from March 3, 1891. This land, whether reserved or not, was public land of the United States, and in kind open to sale and conveyance through the Land Department. United States v. Winona & St. P. R. Co., 165 U. S. 463, 476, 41 L. Ed. 789, 795, 17 Sup. Ct. Rep. 368. The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had authority to make it, the United States had power to make it or to validate it when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of the United States, had that effect. It is said that the instrument was void and hence was no patent. But the statute presupposes an instrument that might be declared void. When it refers to 'any patent heretofore issued,' it describes the purport and source of the document, not its legal effect

> If the act were confined to valid patents it would be almost or quite without use. Leffingwell v. Warren, 2 Black 599, 17 L. Ed. 261."
>
> United States v. Chandler Dunbar Water Power Co., 209 U. S. pp. 449-450.

Thus it is seen that the only question to be determined is whether or not the land was public land of the United States, and open to sale and conveyance by the Land Department. The statute aims to perfect the title in the grantee whether the grant was void or merely voidable.

In the case of United States against The Puget Sound Traction, Light and Power Company, 215 Fed. 436, an action was commenced by the United States on February 9, 1914, seeking the cancellation of a patent to public lands issued to the defendant on June 30, 1904. The land in question was within the boundaries of the Washington National Forest and was alleged to be of great value as a water power site. The bill alleged many false representations as to the purpose and intended use contained in the application; that the Government officials believed the representations and relying on them issued its patent of June 30th, 1904. Subsequently to obtaining the grant, the defendants began the erection of a power plant upon the lands in question—a use entirely different from the mineral use contained in the applica-

tion. The defendants raised the statute of limitations, which has been set forth above. After stating the general rule, the court first states that the United States is not bound by state statutes of limitations, and declares that

> "the statute here in question was enacted for the very purpose of binding the Government. By its very terms it compels the Government to suffer by the negligence of its agents or officers. * * *
>
> "The policy of this statute, as of all statutes of limitations, was to prevent the bringing of actions when the evidence upon which they were based was impaired by time, and, for the sake of repose, to prevent the disturbance of claims to which time, at least, had given some sanctity. The statute would therefore accomplish very little of its object if it was held to apply only to cases where a discovery was made and no action was brought until six years thereafter. These would be only those cases where a breach of duty was committed by officials in failing to prosecute such actions, and it must be presumed that such cases would be few. The great bulk of cases for which this law was enacted would remain untouched. A new statute of limitations enacted by the court would be substituted for that enacted by Congress. The date would be changed from that of the issuance of the patent to that of discovery of the fraud, not in order to accomplish the presumed intent of the Legislature that an established rule of equity was incorporated therein, but regardless of such intent because no such rule as that con-

tended for has ever been established either in the courts of law or equity.

"I am therefore of the opinion that, when the Government is seeking to avoid the bar of a self-imposed statute of limitations, it must allege facts showing that its failure to discover the cause of action within the statutory period was due to concealment by the adverse party, or that the fraud is of a self-concealing nature, and the failure to discover it was not due to negligence or want of diligence on the part of the Government."

United States v. Puget Sound Traction, Light and Power Co. *et al.*, 215 Fed. 436-443.

In the allegations in the bill in this case, nothing is alleged by way of concealment upon the part of the appellant in the use to which the right-of-way was put. There is no allegation that the facts were of a self-concealing nature. The case as it stands upon the bill and motion, comes clearly within the Puget Sound case above cited.

In the recent case of United States v. Morris, 222 Fed. p. 14, in a suit brought by the United States to cancel and set aside a patent issued by the Government to the defendant, after stating the general rule that the United States is now bound by state statutes of limitations, the court holds that the Act of March 3, 1891, hereinbefore quoted, was a bar to the action.

and states "this section in terms applies to all suits brought by the Government to vacate and annul patents to public lands issued under any law of the United States." And further:

> "There is neither allegation or proof of any concealment on the part of Rounds of his purchase of the property, nor of any fraud on his part to delay the commencement of the suit against him until the statute of limitations had run."
>
> 222 Fed. 14-19.

The court then cites and quotes from the case of United States v. Winona and St. Peter Railway Company, 165 U. S., at page 476, which case will be now considered. The last mentioned case of United States v. Winona and St. Peter Railway Company, 165 U. S. 463, was begun by a bill in equity filed by the United States seeking a forfeiture of unearned lands upon the ground of abandonment. Upon the question of the effect of the statute of limitations, Mr. Justice Brewer, after stating that in general the lapse of time would be no bar to such an action for the reason that statutes of limitations cannot be invoked against the Government, continued as follows:

> "But these sections are not all the legislation. Congress evidently recognized the fact that notwithstanding any error in certification or patent there might be rights which equitably deserved protection, and that it would not be fitting for the Govern-

ment to insist upon the letter of the law in disregard to such equitable rights. In the first place, it has distinctly recognized the fact that when there are no adverse individual rights, and only the claims of the Government and of the present holder of the title to be considered, it is fitting that a time should come when no mere errors or irregularities on the part of the officers of the land department should be open for consideration. *In other words, it has recognized that, as against itself in respect to these land transactions, it is right that there should be a statute of limitations; that when its proper officers, acting in the ordinary course of their duties, have conveyed away lands which belonged to the Government, such conveyances should, after the lapse of a prescribed time, be conclusive against the Government, and this notwithstanding any errors, irregularities, or improper action of its officers therein.*

"Thus, in the Act of 1891, it provided that suits to vacate and annul patents theretofore issued should only be brought within five years, and that as to patents thereafter to be issued such suits should only be brought within six years after the date of issue. *Under the benign influence of this statute it would matter not what the mistake or error of the land department was, what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of the title, providing only that the land was public land of the United States and open to sale and conveyance through the land department.*" (Italics are ours.)

United States v. Winona & St. Peter R. Co., 165 U. S. 463, 475-476.

As heretofore stated, it is plaintiff's contention that the grant here in question cannot be included within the words "any patent heretofore issued." Plaintiff has given an extremely limited definition of the word "patent." Strictly speaking, it is the mere document or symbol given to show the right or title which underlies it. A number of definitions of the word "patent" might be cited. In the case of United States v. Stone, 2 Wall. 525, 535, it is stated:

> "The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority."
>
> United States v. Stone, 2 Wall. 525, 535.

A patent is nothing more nor less than a deed from the state, and an innocent purchaser of land covered by a patent stands just as an innocent purchaser of land from one who holds title by deed.

> Nichols v. Commonwealth (Ky.), 64 S. W. 448, 450.

A patent is only another name for a land grant.

> State v. Harman, (W. V.), 50 S. E. 828, 830.

We believe, therefore, that it is clear that the word "patent" is simply a technical phrase applied to any deed or grant deed or any similar

instrument by which the Government conveys its title or any interest therein to an individual. It is in substance analogous in every particular to a common law deed or other conveyance of title, except that the Government is the granting party. There is no difference in substance, whether the conveyance from the Government is called a patent or a grant. Any distinction between the two would be of the most technical and unsubstantial nature.

In the Winona case, heretofore cited, it is apparent that the court had in mind that the statute of limitations here in question applied not only to patents, but to certifications as well. The Act of March 3, 1891, is distinctly referred to. The use of the words "certification" or "patent" twice used by Mr. Justice Brewer cannot be said to be an oversight upon his part. It is, then, we believe, a clear expression of opinion by the Supreme Court that section 8 of the statute of limitations in question should not be given the narrow construction contended for by the appellant.

In a later case in the same court, Louisiana v. Garfield, 211 U. S. 70, 76, Mr. Justice Holmes, in speaking of the Act of March 3, 1891, section 8, the act here in question, said:

> "The only doubt is raised by the statute limiting suits by the United States to vacate patents to five years. (Act March 3, 1891,

> C. 561, Sec. 8, Stats. 1099.) It may be that this act applies to approvals, when they are given the effect of patents, as well as to patents which alone are named."
>
> Louisiana v. Garfield, 211 U. S. 70, 76.

The court refuses, however, to finally decide this question in the case last referred to. The United States was not a party to the action, and the court refused to decide the question in the absence of the United States. This statement, taken in connection with the statement by the court in the Winona case, seems to us to establish the position which this court should now take upon this question, if indeed it has not already taken it.

The beneficial purpose intended by statutes of limitation should not be forgotten in connection with this point. The purpose underlying such statutes is well stated in the case of Wood v. Carpenter, 101 U. S. 135, 139, by Mr. Justice Swayne:

> "Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lis at their foundation. They stimulate to activity and banish negligence. While time is constantly destroying the elements of right, they supply its place by a presumption which renders proof unnecessary. Mere delay extending to the limit

> prescribed is itself a conclusive bar. The bane and the antidote go together."
>
> Wood v. Carpenter, 101 U. S. 135, 139.

The plaintiff in his brief in the Circuit Court quotes several cases to the effect that patents issued to Indian allottees do not come within the meaning of this statute of limitations, and actions are therefore not barred by it, citing United States v. La Roque, 239 U. S. 62, and Northern Pacific Ry. Co. v. United States, 227 U. S. 355. The reason why such patents are not within the act is obvious. The lands in question for which patents were issued were not the lands of the United States. For this reason it could never be said that a statute of limitation designed to run against the United States in its equitable right could affect trust lands held by the United States for the Indians. In the La Roque case the court said:

> "This trust patent was not issued for public lands of the United States, but for reserved Indian lands, to which the public land laws have no application."
>
> United States v. La Roque, 239 U. S. 62.

Further, in Northern Pacific Ry. Co. v. United States, 227 U. S. 355, 356, the sole question there was whether the lands patented were Government lands or were within the boundaries of Indian reservations:

> "There is no question made of the title of the railroad and railway companies or of their respective vendees other than as the lands fall within or without the reservation. If they were within the boundaries of the reservation they were lands of the Indians; otherwise, public lands of the United States, and passed to the companies, respectively, under the Act of Congress and the patents issued in pursuance thereof."
>
> Northern Pac. Ry. Co. v. United States, 227 U. S. 355, 356.

Again, on page 366, it is said:

> "It must be borne in mind that the Indians had the prior right. The rights the Government has are derived through the cession from the Indians. If the Government may control the cession and control the survey, and by the action of its agents foreclose inquiry or determine it, an easy means of rapacity is afforded, much quieter but as effectual as fraud."
>
> Northern Pac. Ry. Co. v. United States, 227 U. S. 355, 356.

As before stated, the reason why the statute of limitations could not apply to such Indian lands is obvious, and affords not the slightest comfort to the plaintiff in the question before this court. The railroad cases cited to the Circuit Court by plaintiff on this question are clearly distinguishable, for the reason that the grants were not obtained under the Act of March 3, 1891, and therefore section 8 of this act might well be

said not to apply to such railroad rights-of-way. In the case before this court the *statute of limitations is an integral part of the act under which the grant was obtained.*

The Act of March 3, 1875 (18 Stats. 482), a railroad aid act, does not contain any statute of limitations, and therefore grants under that act would naturally not be subject to the statute of limitations contained in the act under which the defendant obtained its grant. Nor does the latter act include railroad grants.

Appellant's right-of-way was a direct grant *in presenti* by Act of Congress and is just as effective for all purposes as though evidenced by a patent. It is not a mere easement which can be terminated without authority of Congress, and appellant is entitled to benefit by the statute of limitations from any such attempt to render it ineffective as is here made.

IV.

The Question of the Secretary of the Interior Having Exceeded His Authority in Approving the Grant Was Not Raised by the Bill and Therefore Was Not and Is Not an Issue in the Case.

As we have heretofore stated, the bill for forfeiture was based entirely upon the theory of fraud and mistake. There is no allegation in the complaint that the secretary, or any other land officer, acted in excess of his authority under the law in approving the application for the right of way. Since no such issue was presented and since no evidence was introduced or attempted to have been introduced upon this issue, it seems apparent that the plaintiff should not now be permitted to urge this ground, regardless of its merits, before this court; but should be confined to the issue or issues presented by it in its amended bill.

In paragraph 17 [Rec. p. 8] the bill alleges:

> "That the approval of said Secretary of the Interior of the maps and application hereinbefore mentioned was given solely by reason of the facts alleged in paragraphs 3, 4, 5, 8 and 9 herein, through mistake, error and inadvertence in the belief that said canal was to be used for the main purpose of irrigation and that the canal would be so used by the defendant."

An examination of the paragraphs there mentioned will clearly show that no allegation either direct or indirect, is made to the claim that the secretary exceeded his authority or misunderstood the scope of the act under which the right of way was granted.

This issue now urged, which was not before the trial court, of excess of authority on the part of the Secretary of the Interior in misinterpreting the scope of the Act of Congress, is necessarily directly opposed to the theory of fraud and mistake upon which the bill was based. It presupposes a full knowledge on behalf of the land department and a misapplication of the law as applied to those facts.

It is therefore submitted that it cannot now be urged that even though the evidence did not establish fraud or mistake of fact, it nevertheless established a mistake of law on behalf of the land department or an excess of authority. This same contention was made on behalf of the United States in the case of

United States v. Safe Investment Gold Mining Co., 258 Federal (C. C. A.) 872,

heretofore cited, which was a suit to cancel a patent secured through fraud. It was there contended that if the evidence failed to prove fraud, it did establish that the patent was issued without authority in law because it was issued

upon insufficient evidence of a discovery of mineral. The court is disposing of this contention stated, page 879:

> "It is finally claimed by the plaintiff that, though the evidence fails to establish fraud, yet it establishes a mistake on the part of the Interior Department in issuing the patent, and that for this reason the patent should be canceled. It is sufficient to say, as to this contention, that no such issue is presented by the bill of complaint, and that, when a suit of this character is based upon fraud, the plaintiff will be confined, as a general rule, strictly to that issue. Eyre v. Potter, 15 How. 42, 55, 15 L. Ed. 592; French v. Shoemaker, 14 Wall. 314, 335, 20 L. Ed. 852; Wall v. Parrott Silver & Copper Co., 244 U. S. 407, 37 Sup. Ct. 609, 61 L. Ed. 1229; Reed v. Munn, 148 Fed. 737, 80 C. C. A. 215."
>
> United States v. Safe Investment Gold Mining Co., 258 Fed. 872, 879.

Among the cases there cited is that of Wall v. Parrot Silver & Copper Co., 244 U. S. 407, 37 Sup. Ct. 609, 61 L. Ed. 1229, where Mr. Justice Clarke, rendering the opinion of this court, states, page....:

> "An examination of this record leads us to fully agree with the trial court in its conclusion that the appellants failed utterly to sustain their allegations that the property of the Parrot Company was fraudulently dissipated and depreciated through the management of the defendants prior to the sale, or that the sale made was in

any respect fraudulent. Upon this conclusion the judgment of the District Court might well be affirmed, *for the reason that where fraud is charged in a bill or set up in an answer, and is denied, the party making the charge will be confined to that issue.*" (Italics are ours.)

Wall v. Parrot Silver & Copper Co., 244 U. S. 407.

It is submitted, therefore, that the question of the secretary having exceeded his authority, due to a mistake of law, is not involved in this case.

V.

The Learned Circuit Court of Appeals in Reversing the Decree of the District Court Erred in Making Unwarranted Assumptions of Fact and Erred as to the Law Applicable Thereto.

The opinion of the Circuit Court of Appeals reversing the decree of the District Court [Rec. pp. 69-75] is based upon an assumption, we respectfully submit, not warranted by the facts. In paragraph 3 of the opinion [Rec. p. 74] in speaking of the first certificate of the company in the application for the right of way, it is said to have been made to overcome the objection made by the Commissioner of the General Land Office to the granting of the right of way. To overcome this objection (it is said), doubtless, the proper officers of the Power Company certified, "that the right-of-way for said canal was desired solely for the purposes described by the aforesaid acts (referring to the acts of 1898) was essentially and unqualifiedly false."

There is nothing in the record to justify such an inference or assumption that it was unqualifiedly false, or false at all, because the record shows [Rec. pp. 10-17] that the Power Company was organized both for the purpose of creating power and for supplying water for irrigation; and that it had a large quantity of

water intended to, and that could be, diverted to both such purposes. There was no concealment made at any time, and no representation that the right-of-way would be used, or was intended to be used, at the time the first application was made, for power purposes alone.

At the time the second application was made, after the completion of the canal, an amendment of the line of right-of-way was sought because of certain deviations made in the line owing to topographical difficulties met with during the process of construction. This was not a new right-of-way but simply the same right of way that had been approved in the beginning and because it was represented on this application for the amendment that the right-of-way was sought "for public purposes," that statement too was designated by the Circuit Court as being unqualifiedly false.

In the first place, it was based upon the language of the act under which the right-of-way was sought and therefore was not antagonistic to the act, nor could it be construed as any misrepresentation concerning it. But owing to certain litigation which was instituted by the Miller & Lux Company and others who claimed to have an easement in and control the water for irrigation of the entire river, many miles below the Power Company's works, litigation was commenced as in the statement already made,

in the Superior Court of Kern county, which was transferred to the Federal Court of the Ninth Circuit, and a subsequent action was brought in the Superior Court of Kern county, this litigation covering considerable time [Rec. p. 35], which may be inferred resulted in a contract of compromise which was entered into [Rec. pp. 42-60] whereby the Kern River Company waived its rights to use the water for irrigation and agreed to confine the use thereof to the generation of power alone. The company, until the compromise, held and intended to use a certain amount of water for irrigation after it had used the same for power purposes as shown by the testimony of the witness, A. C. Balch. [Rec. pp. 63-65.] His testimony also shows that the company acquired 3040 acres of riparian land through which the Kern River flows, for the purpose of acquiring the water rights appurtenant thereto and used thereon, and the idea of the company was to conserve the water of Kern River in the first place to supply water for the irrigation of lands in the Hot Springs Valley, through which part of the canal extends, the land being 60 to 70 feet and more in elevation above the river, and also to sell and dispose of the water conserved for water rights for irrigation below the canal. He illustrated the value of such water conservation by the experience of the company on the

San Gabriel River, so that from the testimony of Balch, who was an officer of the company and actively engaged in managing it prior to, and at the time of, the construction of the canal, the company had two objects in view, namely, to build the canal for power purposes and to supply water for irrigation to the Hot Springs Valley, and to conserve the water of the river so that it could be used for irrigation in the larger Kern Valley some distance below the power house site, and sold or disposed of as might seem best to the company.

This conservation of water is in accordance with the policy of, and is encouraged by, the laws of the state of California. (Burr v. Maclay Water Co., 154 Cal. 428, 436.) There is nothing in any of the acts of Congress referred to in this case which precludes a company organized for either power or irrigation purposes, or both, from selling or disposing of water and water rights for the purposes of irrigation, nor is there any prohibition against compromising or composing adverse claims. Therefore, this second assertion that the statement made from the law under which the right-of-way was sought, was unqualifiedly false is also an unwarrantable assumption. Therefore, it appears that the case turned in the Circuit Court of Appeals upon two assumptions of false statement not borne out by the record.

It is stated, but not in very definite terms, by the learned Circuit Court of Appeals [Rec. p. 74], that this remedy of injunction was

> "another ground upon which the jurisdiction of a court of equity may perhaps be sustained."

That court, however, in asserting that this remedy perhaps exists, assumes the whole point in question, namely, that the appellant acquired its right-of-way by fraud and for purposes other than the use to which it is being put, and that the use to which it is being put is not authorized by law. No authority is cited and no very persuasive argument is advanced in support of this conclusion. The statement of the learned Circuit Court may, perhaps, be justified if the whole case against appellant be assumed as an established fact, but we submit that otherwise it is unwarranted.

It, of course, does not make much difference either to the United States or to the Kern River Company what particular form of remedy is enforced. It is the question of the right to enforce any of these remedies which are requested in the bill that is of importance to both parties. For these reasons we do not see that the point suggested is helpful or is one upon which a decision upon the merits can turn, it being dependent on the right of the United States under the bill as brought to the relief mainly sought.

It is further stated in the opinion of the Circuit Court [Rec. p. 73], in answer to arguments and authorities cited in the brief of Kern River Company before that court, that the case is not one of forfeiture, but the

> "ordinary suit to set aside the approval of the Secretary of the Interior on the ground of fraud and mistake, like the familiar suits prosecuted every day to set aside patents obtained by similar means."

It is submitted that since the land, when selected and approved under the act became a completed grant (Noble v. Union River Logging Co., 147 U. S. 165), and the effect of setting aside the approval of the Secretary of the Interior on the ground of fraud or mistake, revokes or destroys appellant's right-of-way as effectively as it could possibly be done, it is, we repeat, in substance a forfeiture and to call it by any other name does not alter in the slightest degree the real substance of the case.

Furthermore, the case relied upon by the learned Circuit Court in support of this proposition is Noble v. Union River Logging Co., 147 U. S. 165, above referred to, in which the only point decided was that a successor in office could not revoke a grant of right-of-way given by a prior Secretary of the Interior and that the grant once given is final so far as the executive department of the government is concerned.

In the Noble case the court did state, page 176:

> "that if it were made to appear that the right-of-way had been obtained by fraud a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained."

But the court does not say that such a cancellation and annulment is not in effect a forfeiture, nor is it there stated that such a bill could be brought without authority of Congress, the grantor in this case, as is assumed by the Circuit Court.

The question here was not involved in the Noble case. That case, however, does decide that once the grant is given it ceases to be under the control of the executive department of the United States, and this of necessity seems to us to imply that a bill for cancellation or forfeiture could not be initiated even by any other department or officer of the government without the express authority of Congress for such action.

The Circuit Court of Appeals also cites the case of United States v. Poland, 251 U. S. 221, decided by this court January 5th, 1920, as authority for the proposition that in any event the action may be sustained regardless of fraud or mistake upon the ground that the Secretary of Interior in approving the grant exceeded his authority and that the validity of his approval may well be challenged in a suit of this kind.

We do not believe that the case of United States v. Poland is in point upon the situation here involved, nor does it sustain the proposition upon which it was cited.

In that case a bill was brought by the United States to cancel a patent for public land in Alaska, based on soldiers' additional homestead rights. A single body of land was granted larger than was authorized by the statute. Upon considering the question of the effect of the statute, this court decided that it did not permit a compact or single body of land, larger than 160 acres to be granted, and on this ground the patent was set aside. It is further to be noted that the bill for cancellation in the Poland case expressly alleged that the land officers in passing both applications to entry and patent acted upon a misconception of the law and their authority and that the patent for a larger single body of land was in violation of law and therefore should be cancelled. There is no such allegation in the bill in the instant case nor any allegation similar to it.

Upon the authorities heretofore cited it seems clear that in the absence of an issue raised by the bill a decree based thereon is unwarranted. In the Poland case the land officers were in error in interpreting the scope and meaning of the act granting the land and such a grant would therefore be just as voidable, if not void, as though

the land officers had attempted to issue a patent upon land not subject to patent.

The patents in the Poland case may have been issued by the land officers "with full knowledge of all the facts," as stated by the Circuit Court in its opinion [Rec. p. 75], but they were issued under a misconception of the scope of the granting act and the bill for cancellation expressly so alleged and raised the issue. It seems furthermore to have been the main question in the case.

A question of fraud was raised by the bill, but this court states that

> "this allegation must be put out of view, first, because the words of the affidavit as set forth in the complaint do not sustain the pleader's conclusion as to what was represented, and, second, because the complaint makes it certain that application and other entry papers clearly disclosed that the two tracts were contiguous to the extent of having a common boundary one-half mile in length."

This statement by this court in the Poland case is also peculiarly apt to the situation here involved. For, as we have heretofore urged, though fraud and mistake are alleged in the bill, the facts set forth in the bill in support of such fraud and mistake and as shown in the record under the stipulated facts, conclusively establish, we believe, that there was no fraud or mistake, and in the language of this court "do not

sustain the pleaders' conclusion as to what was represented."

We believe that upon careful consideration it will be seen that the learned Circuit Court of Appeals, in reversing the decree of the District Court, erred in making the assumption that fraud and mistake had been established—against the decision to the contrary by the trial court—and in basing its conclusion upon decisions of this court which do not sustain the conclusion reached by the Circuit Court.

VI.

In the Absence of a Right of Forfeiture of Appellant's Right of Way an Injunction Against Its Further Use, Accomplishing Substantially a Forfeiture, Is Unwarranted.

It seems hardly necessary to urge the proposition that if a forfeiture is unwarranted by the issues presented in the bill and the proof thereunder, an injunction against the continued use of appellant's right-of-way is improper. Equity dealing with the substance and not with the form will not, under the guise of one form of remedy accomplish that which is not justified by a direct proceeding, except in those exceptional cases where it is necessary to accomplish a just result. It is obvious that an injunction will, in substance, work a forfeiture when it deprives appellant of all beneficial use of the right-of-way in question. If a forfeiture itself is not justified by reason of a failure of proof of fraud or mistake, or if there is no authority on the part of the Attorney General to enforce a forfeiture without authority of Congress, or if the action is barred by the self-imposed statute of limitations, or for any other substantial reason, a forfeiture should not be granted, in either of these events an injunction against the continued use of the right-of-way by appellant would be unjustified.

VII.

The Development of Power to Be Sold to the Public Comes Fully Within the Terms "Purposes of a Public Nature" Contained in Sec. 2 of the Act of May 11, 1898.

This point has heretofore been suggested and we wish now to cite authorities in support of the proposition that the development of power for sale to the public is a use for purposes of a public nature.

In the case of Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Company, 240 U. S. 30, 60 Law Ed. page 507, a petition for a writ of prohibition to prevent the Probate Court of Tallapoosa county from taking jurisdiction of condemnation proceedings instituted by the Alabama Interstate Power Company was before this court for decision.

Mr. Justice Holmes, in delivering the opinion of this court, stated:

> "The principal argument presented that is open here, is that the purpose of the condemnation is not a public one. The purpose of the power company's incorporation, and that for which it seeks to condemn property of the plaintiff in error, is to manufacture, supply, *and sell to the public, power produced by water as a motive force.* In the organic relations of modern society it may sometimes be hard to draw the line that is supposed to limit the authority of the legislature to exercise or delegate the power of

eminent domain. But to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public, we should be at a loss to say what is." (Italics are ours.)

A similar situation was presented in the case of Walker v. Shasta Power Co. ,160 Fed. 856, involving the right of the power company to institute condemnation proceedings, the question involved sufficiently appears from the portion of the opinion here quoted:

"The question first to be determined is whether the use for which condemnation is sought is a public use. Section 1238 of the Code of Civil Procedure of California makes provision for the exercise of the right of eminent domain in behalf of public uses, and enumerates among other public uses the following:

'Canals, reservoirs, dams, ditches, flumes, aequeducts and pipes for supplying and storing water for the operation of machinery for the purpose of generating and transmitting elecricity for the supply of mines, quarries, railroads, tramways, mills and factories with electric power; and also for the supplying of electricity to light or heat mines, quarries, mills, factories, incorporated cities and counties, villages and towns; and also for furnishing electricity for lighting, heating or power purposes to individuals or corporations, together with lands, buildings and all other improvements

in or upon which to erect, install, place, use or operate machinery for the purpose of generating and transmitting electricity for any of the purposes or uses above set forth.'

There can be no doubt that within this provision the furnishing of electricity as it is proposed to be furnished by the defendant in error is a use for which the legislature intended that the right of eminent domain might be exercised."

* * * * * * * *

"And it has been generally held by the courts that the generation of electric power for distribution and sale to the public on equal terms is a public enterprise, and that water used for that purpose is devoted to a public use. Light & Power Co. v. Hobbs, 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 581; Hollister v. State, 9 Idaho 8, 71 Pac. 541; Grande Ronde Electrical Co .v. Drake, 46 Or. 243, 78 Pac. 1031; In re Niagara L. & O. Power Co. (Sup.), 97 N. Y. Supp. 853; Minnesota Canal & Power Co. v. Koochiching, 97 Minn. 429, 107 N. W. 405. In the case last cited the Supreme Court of Minnesota said:

'Electric lighting is universally recognized as a public enterprise, in aid of which the right of eminent domain may be invoked.'

"In Light & Power Co. v. Hobbs, 72 N. H. 531-535, 58 Atl. 46, 66 L. R. A. 581, the court said

'Like water, electricity exists in nature in some form or state, and becomes useful as an agency of man's industry only when collected and controlled. It requires large capital to collect, store, and distribute it for general use. The cost depends largely upon the location of the power plant. A water

> power having a location upon tide water reduces the cost materially. It may happen that the business cannot be inaugurated without the aid of the power of eminent domain, or acquisition of necessary land or rights in land. All these considerations tend to show that the use of land for collecting, storing, and distributing electricity for the purposes of supplying power and heat to all who may desire it is a public use similar in character to the use of land for collecting, storing, and distributing water for public needs—a use that is so manifestly public that it has been seldom questioned, and never denied.'"

The fact that the amendment of 1898 provides for the acquirement of a right of way for power purposes as subsidiary to irrigation is not conclusive that power purposes cannot, as a matter of law, as the Circuit Court seems to hold, come within the terms of the act providing for a right-of-way for "purposes of a public nature." The development of power is certainly of such a character as to come within the phrase "purposes of a public nature." In this particular case, as shown by the stipulated facts, a large percent of the power is in fact used for operating street railways and in lighting municipalities in various cities in Southern California, and yet the Circuit Court states, without apparently considering the question of what is, or what is not, a use for a public nature, that it can never be used for purposes of a public nature if the development of power is involved.

To so limit and narrow the meaning of the phrase "purposes of a public nature" was never intended, we believe, by Congress. It is difficult to see, as is stated by the authorities, what could be more in the nature of a public use than furnishing power to cities, street railways, and illuminating light for cities. Street railways are public service corporations and a necessary part of their operation is adequate electrical energy, and if any use of a right-of-way may reasonably be said to be for purposes of a public nature, it is submitted that such use is here found. Furthermore, the certificate of the Kern River Company upon which the Department of Interior acted, was that it was to be used for purposes of a public nature. This certificate was apparently satisfactory to the Department of Interior.

It was urged on behalf of the United States in its brief in the Circuit Court of Appeals, and will undoubtedly be urged here, that the United States was not actually attempting to forfeit the right-of-way of appellant, Kern River Company, in this action, but was merely insisting that the Kern River Company apply for and obtain a permit to use the right-of-way under the Act of February 15, 1901 (set out in appendix to this brief), but this it is submitted would be in substance a forfeiture of that which the Kern River Company has lawfully obtained under the act of

March 3, 1891, and the Act of May 11, 1898. Its present right-of-way is by way of a completed grant and gives to the Kern River Company a permanent and secure right-of-way, one which lends security to the company, to its stockholders and to the public.

The permit provided for under the Act of February 15, 1901, is revocable by the Secretary of Interior, or his successor, in his discretion, and does not confer any right or easement or interest in, to or over any public land, reservation, or park.

It is, therefore, submitted that to forfeit a grant of a permanent easement which is beyond the power of the Secretary of Interior or his successor, or any other executive officer of the government (Noble v. Union River Logging Co., 147 U. S. 165), and to compel the Kern River Company to apply for a revocable permit under an act which leaves them no redress or appeal if the same is revoked in the discretion of the then secretary, is in the fullest sense of the word a true forfeiture of appellant's vested right-of-way.

Conclusion.

In concluding our argument, we shall very briefly refer to the main points upon which we urge that the decree of the learned Circuit Court of Appeals be reversed:

First,—because a careful analysis of the facts concerning the application and the granting of the right-of-way establishes the fact that the decision of the trial court, holding that there was no fraud practiced upon the government in obtaining the grant, nor any mistake made by the Department of Interior in approving the various applications for the right-of-way was correct.

Second,—that the authorities established that without the sanction of an act or resolution of Congress or a provision for forfeiture in the act under which the grant was obtained, no right exists in the Attorney General *per se* to seek to enforce such a forfeiture or other remedy looking to the cancellation or interference with a grant solemnly given after careful consideration by the highest authorities of the Interior Department.

Third,—upon the ground that the remedy sought to be obtained is barred by the self-imposed statute of limitations made an integral part of the very act under which the defendant's right-of-way was obtained.

Fourth,—because the act itself was sufficiently broad to entitle the Kern River Company to a right-of-way for public purposes and there was no showing on behalf of the government that such a use was not being made of the right-of-way.

And, finally, for the reasons, arguments and authorities heretofore urged in this brief.

Upon each and all of these independent grounds we earnestly submit that this court should reverse the decree rendered by the learned Circuit Court of Appeals below.

Respectfully submitted,

JAMES A. GIBSON,

ROY V. REPPY,

Attorneys for Appellants.

HENRY F. PRINCE,

Of Counsel.

APPENDIX.

Extracts From the Statutes of the United States Relating to Water Rights and Rights of Way for Reservoirs and Canals Upon Public Lands and Reservations of the United States.

Chap. 561. An Act to Repeal Timber-Culture Laws, and for Other Purposes.

Approved March 3, 1891.

26 U. S. Stats., at L. 1095, 1101-3.

Sec. 18. That the right-of-way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any state or territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: Provided, That no such right-of-way shall be so located as to interfere with the proper occupation by the Gov-

ernment of any such reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective states or territories.

Sec. 19. That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights-of-way shall pass shall be disposed of subject to such right-of-way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

Sec. 20. That the provisions of this act shall apply to all canals, ditches, or reservoirs, here-

tofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir, has been or shall be constructed by an individual or association of individuals it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior, and with the register of the land office where said land is located, a map of the line of such canal, ditch, or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this act from the date of their filing, as though filed under it: Provided, That if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture.

Sec. 21. That nothing in this act shall authorize such canal or ditch company to occupy such right-of-way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch.

* * * * * * * *

Sec. 24. That the President of the United States may, from time to time, set apart and reserve, in any state or territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

Sec. 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.

Chap. 37. An Act to Permit the Use of the Right-of-Way Through the Public Lands for Tramroads, Canals and Reservoirs and for Other Purposes.

Approved January 21, 1895.

28 U. S. Stats. at L. 635.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of the right-of-way

through the public lands of the United States, not within the limits of any park, forest, military or Indian reservation, for tramroads, canals or reservoirs to the extent of the ground occupied by the water of the canals and reservoirs and fifty feet on each side of the marginal limits thereof; or fifty feet on each side of the center line of the tramroad, by any citizen or any association of citizens of the United States engaged in the business or mining or quarrying or of cutting timber and manufacturing lumber.

Chap. 179. A Act to Amend the Act Approved March Third, Eighteen Hundred and Ninety-one, Granting the Right-of-Way Upon the Public Lands for Reservoir and Canal Purposes.

Approved May 14, 1896.

29 U. S. Stats. at L., 120.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the Act entitled "An Act to permit the use of the right-of-way through the public lands for tramroads, canals and reservoirs, and for other purposes," approved January twenty-first, eighteen hundred and ninety-five, be, and the same is hereby, amended by adding thereto the following:

"Sec. 2. That the Secretary of the Interior be, and hereby is, authorized and empowered,

under general regulations to be fixed by him, to permit the use of right-of-way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and forest reservations of the United States, by any citizen or association of citizens of the United States, for the purposes of generating, manufacturing, or distributing electric power."

Chap. 292. An Act to Amend an Act to Permit the Use of the Right-of-Way Through Public Lands for Tramroads, Canals, and Resrevoirs, and for Other Purposes.

Approved May 11, 1898.

30 U. S. Stat. at L., 404.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to permit the use of the right-of-way through the public lands for tramroads, canals, and reservoirs, and for other purposes," approved January twenty-first, eighteen hundred and ninety-five, be, and the same is hereby, amended by adding thereto the following:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right-of-way upon the public lands of the United States, not within limits of any park,

forest, military, or Indian reservations, for tramways, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or association of citizens of the United States, for the purposes of furnishing water for domestic, public and other beneficial uses.

"Sec. 2. That the rights-of-way for ditches, canals, or reservoirs, heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the Act entitled 'An Act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation."

Chap. 372. An Act Relating to Rights of Way Through Certain Parks, Reservations, and Other Public Lands.

Approved February 15, 1901.

31 U. S. Stats. at L., 790.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of

the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights-of-way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: Provided, That such permits shall be allowed within or through any of said parks

or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: Provided, further, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights-of-way for telegraph companies over the public domain: And Provided, further, That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

No. [redacted]50

In the Supreme Court of the United States

OCTOBER TERM, 1920

KERN RIVER COMPANY, PACIFIC LIGHT AND POWER CORPORATION, AND SOUTHERN CALIFORNIA EDISON COMPANY, APPELLANTS,

v.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1921

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CITATIONS.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

KERN RIVER COMPANY, PACIFIC LIGHT *and* POWER CORPORATION, *and* SOUTHERN CALIFORNIA EDISON COMPANY, *Appellants*,

v.

THE UNITED STATES OF AMERICA.

No. 382.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

By an amended bill (R. 1–10), filed in the United States Court for the Southern District of California, the United States sought a decree against the Kern River Company, a corporation, setting aside, vacating and annulling a grant of a right of way affecting public lands in Kern County, California, now within the Sequoia National Forest, approved by the Secretary of the Interior to the said company upon its application therefor made under sections 18 to 21 of the Act of March 3, 1891, c. 561, 26 Stat. 1095,

1101, 1102, and the Act of May 11, 1898, c. 292, 30 Stat. 404. An injunction was also sought to restrain the defendant from using the right of way until it should have applied for and had it approved under the Act of February 15, 1901, c. 372, 31 Stat. 790.

By leave of the District Court the bill was subsequently amended to make the Pacific Light and Power Company and the Southern California Edison Company parties defendants, they having acquired an interest in the property involved, and the relief prayed against Kern River Company was prayed for against them, R. 66, 67.

The Act of March 3, 1891, *supra*, provided in sections 18 to 21 for a grant of a right of way through the public lands of the United States to any canal or ditch company *formed for the purpose of irrigation*, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals and fifty feet on each side of the marginal limits thereof. It was provided (section 18) that all maps of location of any company desiring the benefits of the Act should be subject to the approval of the Secretary of the Interior. It was required (section 19) that within a specified time after the location of ten miles of its canal, if upon surveyed lands, or if upon unsurveyed lands then within the same specified period after survey, the company should file a map of its ditch or canal, and that upon approval thereof by the Secretary all lands over which the right of way should pass should thereafter be disposed of subject to said right of way.

There was a proviso in section 20 that if any section of the proposed canal or ditch be not completed within five years after location, the rights granted should be forfeited as to that portion.

Section 21 is as follows:

> That nothing in this act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch.

The Act of May 11, 1898, *supra*, in section 2, amended the Act of March 3, 1891, by providing that the right of way granted under that Act (sections 18, 19, 20, 21)—

> may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation.

The Kern River Company, in June, 1898, filed with the proper local land officers an application for a right of way for a canal under these two Acts affecting certain lands specified in the bill. Par. VI, R. 4. With the map filed as a part of its application was a certificate of the president of the company setting forth that the right of way thus applied for was desired solely for the purposes prescribed by the said Acts. Thereafter, the Secretary of the Interior approved said application. Bill, pars. IV and V, R. 3.

Subsequently, in January, 1905, the company filed an application for approval of a right of way

for an amended location of its canal covering the lands included in its original application and other lands. This application was accompanied by a map, with which was a certificate by the president of the company that it was made so that the company might obtain the benefits of the two Acts referred to, and that the right of way was desired for *public purposes*. There was a further certificate that the canal, the right of way for which had been approved by the Secretary under the first application, had been actually constructed, except as the route thereof differed, as shown by the amended application, from the originally proposed route. Bill, par. IX, R. 5. This application was approved by the Secretary on November 27, 1905. Bill, par. XI, R. 6.

The theory of the Government's bill was that the Secretary's approval of the applications for these rights of way was secured through fraud, in that it was not the intention of the company to construct or use the canal for the purpose of irrigation and that it was never used for such purpose; on the contrary, the intention at all times was to use the canal for the sole purpose of carrying water to be used in generating power, and it has at all times since the construction of the canal been used for such purpose. Further, that the Secretary's approval of the maps and applications was given in reliance upon these representations and through error, mistake and inadvertence in the belief that the canal was to be used for the main purpose of irrigation,

and that there was attached to the grant thus secured an implied condition that the canal was to be so used.

It also appears that when the Secretary's attention was called to the fact that the canal was being used for power generating purposes, he caused notice to be served upon the Kern River Company requiring it to show cause why proceedings to cancel the grant should not be had. To this the company made answer, and thereafter the Secretary notified the company that it must amend its application so as to bring it within the provisions of the Act of February 15, 1901, *supra*. (This Act provided for issuance of permits for rights of way for power purposes.) The company declined to take action or to seek a permit under said Act.

To the Government's amended bill a motion to dismiss was interposed (R. 12, 13), the grounds of which were (1) that there was no authority for the bringing of the suit; (2) because the bill showed that the plaintiff was not entitled to relief; and (3) the statute of limitations in section 8 of the Act of March 3, 1891, *supra*.

This motion was denied (R. 13) and the defendant then made answer. R. 13–23. The facts above set forth were admitted, but the company asserted that no misrepresentations were made to the Secretary in connection with the procurement of the approval of the applications; that the company did intend to use the canal for irrigation purposes as well as

for power purposes, although it was admitted that it never did use it for the former. It was averred that the company secured under its applications a right of way for a canal for diverting and conveying water for the generation of electric power, and for irrigation, particularly under section 2 of the Act of May 11, 1898, *supra*, which granted same for "purposes of a public nature." There was a further defense made by a plea of laches on the part of the Government in bringing the suit.

The case was tried upon a stipulation of facts (R. 33–63), and oral testimony of one witness was adduced by the defendant company. R. 63–66. The main facts therein contained have been already detailed.

In the District Court there was a decree in favor of defendants, dismissing the bill. This decree is not in the record, nor are the findings made by that court.

Upon appeal, the Circuit Court of Appeals reversed the decree and remanded the cause to the District Court with instructions to enter a decree in favor of the United States, cancelling the orders approving the maps and location for the right of way, and enjoining the companies from further maintaining their canal upon the National Forest; the operation of the injunction to be suspended, however, to enable the companies to apply for such permit or right as is authorized by law. R. 76. Opinion, R. 69–75, 264 Fed. 412.

The appeal of the companies brings the case to this court.

PROPOSITIONS.

In support of the decree of the Circuit Court of Appeals we submit the following propositions:

1. The United States was entitled to bring this suit without specific statutory authorization.

2. The approval of the Secretary of the Interior of the applications for right of way was secured by fraud, concealment, and misrepresentation.

3. The Secretary's approval was beyond his authority, since the Acts under which the applications were made did not contemplate use of the right of way solely for power generating purposes.

ARGUMENT.

I.

The United States was entitled to bring this suit without specific statutory authorization.

It is asserted that inasmuch as this is a suit for the forfeiture of the right of way, there must be an express declaration of forfeiture by Congress to warrant the institution of the proceedings. We contend that in a case such as this, assuming the action to be one solely for forfeiture, no specific authorization is necessary. It is true that neither the Act of March 3, 1891, not the Act of May 11, 1898, contains a specific declaration that failure to use the right of way for the purposes contemplated by the Acts will subject it to forfeiture, but such a use is an implied condition of the grant, and a breach of an implied

condition constitutes as valid a basis for a suit as a breach of an express condition.

In *Rio Grande Ry.* v. *Stringham*, 239 U. S. 44, this court considered the right conferred by the Act of March 3, 1875, c. 152, 18 Stat. 482, which granted a right of way for railroads. This was a general Act in that it designated no specific grantee, and is in all practical aspects like the Acts here in question.

In the opinion, Mr. Justice Van Devanter thus characterized the nature of the grant (p. 47):

> The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee.

Considering, then, that the right of way granted to the Kern River Company was given *with an implied condition of reverter in the event the company ceases to use it for the purpose for which granted*, we can perceive no reason or necessity for an express declaration by Congress that the grant shall be considered forfeited, as a condition precedent to the filing of a suit to reinvest the grantor with title.

This court in *Schulenberg* v. *Harriman*, 21 Wall. 44, considered whether a specific grant in aid of railroad construction had become forfeited as to certain lands, and, in discussing the question as to how a breach of condition might be enforced, said (pp. 63, 64):

> In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. At common law the sovereign could not make an entry in person, and, therefore, an office-found was necessary to determine the estate, but, as said by this court in a late case, "the mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings."

In *Bybee* v. *Oregon & California R. R. Co.*, 139 U. S. 663, one of the questions presented was whether a grant to the Central Pacific Railroad had lapsed because of failure to construct the railroad. This court said (p. 674):

> And in all the cases in which the question has been passed upon by this court, the failure to complete the road within the time limited is

> treated as a condition subsequent, not operating *ipso facto* as a revocation of the grant, but as authorizing the government itself to take advantage of it, *and forfeit the grant by judicial proceedings, or by an act of Congress, resuming title to the lands.* (Italics ours.)

And at page 675:

> In *St. Louis &c Railway Co.* v. *McGee*, 115 U. S. 469, 473, it was said by Chief Justice Waite to have been often decided "that lands granted by Congress to aid in the construction of railroads do not revert after condition broken until a forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose, or through some legislative action legally equivalent to a judgment of office found at common law." "Legislation to be sufficient must manifest an intention by Congress to reassert title and to resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture, and judgment therein establishing the right, it should be direct, positive and free from all doubt or ambiguity." The manner in which this forfeiture shall be declared is also stated in *United States* v. *Repentigny*, 5 Wall. 211, 267; *Farnsworth* v. *Minnesota & Pacific Railroad Co.*, 92 U. S. 49, 66; *McMicken* v. *United States*, 97 U. S. 204, 217.

It was said by this court in *Atlantic & Pacific R. R. Co.* v. *Mingus*, 165 U. S. 413, 428:

> It cannot be supposed that Congress intended to vest a title in the railway company

> to this enormous grant of lands without contemplating that the Government might in some way reacquire it in case of a failure of the company to comply with the conditions of the grant. No express provision for a forfeiture was required to fix the rights of the Government. If an estate be granted upon a condition subsequent, no express words of forfeiture or reinvestiture of title are necessary to authorize the grantor to reenter in case of a breach of such conditions. *Stanley* v. *Colt*, 5 Wall. 119; *Mead* v. *Ballard*, 7 Wall. 290; *Ruch* v. *Rock Island*, 97 U. S. 693; *Hayden* v. *Stoughton*, 5 Pick. 528; *Jackson* v. *Allen*, 3 Cowen, 220; *Gray* v. *Blanchard*, 8 Pick. 283.

Now, if we correctly understand the position of appellants, it is that before a forfeiture can be enforced there must be both legislative declaration *and* judicial proceedings. We think the cases above cited clearly show either method sufficient and that both are not essential.

So far as we have been able to ascertain, the only case in this court which had in it this precise question is *Rio Grande Dam & Irr. Co.* v. *United States*, 215 U. S. 266, but the right to a forfeiture without specific authority therefor, while in the case, was not an issue. The point considered was as to the power of the trial court to permit amendment of the Government's bill after the case had been remanded by this court for further evidence upon the issues already made. Originally, the bill sought an injunction restraining the Rio Grande Company from constructing a dam across, and a reservoir on

or near, the Rio Grande River. In the supplemental bill, the right to file which was sustained, there was a prayer for a decree declaring a forfeiture of the rights acquired by the company under the Act of March 3, 1891, by reason of an approval of its application for a right of way for a dam. While the point was not passed upon, yet it is fair to presume that the decree *pro confesso*, declaring a forfeiture of the right of way, would not have been sustained in this court were it secured by a bill for the filing of which no authority was shown.

Other than the case at bar, there are but three cases reported in which this question has been considered by the federal courts.

In the case of *United States* v. *Whitney*, 176 Fed. 593, the United States brought a suit to secure a forfeiture of a reservoir site approved to defendant's testator under this same Act of March 3, 1891, as amended by the Act of May 11, 1898. The right of the Government to sue without specific authority from Congress was directly challenged. In a well considered opinion the Circuit Court for the district of Idaho sustained the right. It was there said, (pages 598, 599):

> The Act of March 3, 1891, is general and permanent in its character, and operates continuously to convey the title to public lands to all persons complying with its provisions. It can not be doubted that the forfeiture clause equally with the granting clause is also in the nature of general law and of a permanent character, and that, being true, it is not clear

> why it should not be held to be ample warrant to the Attorney General to enter the courts and there seek the enforcement of public rights and the restoration of the title to public property, thus "executing the law." By the Constitution it is made the duty of the chief executive to "take care that the laws be faithfully executed"; and, if certain rights are granted by general law, and by the same general law it is provided that such rights shall be forfeited on the breach of certain conditions, the breach existing, it is thought that the executive has the authority to institute proceedings in the courts to have such forfeiture judicially declared, and that suits brought for that purpose are judicial proceedings authorized by law.

The case of *United States* v. *Washington Imp. & D. Co.*, 189 Fed. 674, was a suit brought to secure a forfeiture of a right of way granted to the Washington Improvement & Development Company. It was held by the Circuit Court for the eastern district of Washington that specific congressional authority was essential to enable the Attorney General to bring the suit. That case, however, is different from the instant case for the reason that the grant was made by a special Act to a particular company.

It is true that in these two cases there was a failure to construct, and in the 1891 Act there is an express declaration (section 20) that upon failure to construct the right granted shall be forfeited, but we do not think that is a controlling distinction. If the forfeiture can be maintained for breach of an

express condition, it could equally be maintained for breach of an implied condition.

It is interesting to note that Judge Rudkin who rendered the opinion in *United States* v. *Washington Imp. & D. Co.*, *supra*, also wrote the opinion of the Court of Appeals in the instant case, upholding the right of the Government to sue.

A more recent case is that of *Union Land & Stock Co.* v. *United States*, 257 Fed. 635, in which the United States sued to have declared a forfeiture for non-construction of a right of way and easement for the storage of water, which had been approved to the Company upon its application under the Act of March 3, 1891. There was a decree for the United States and defendant appealed. It was contended that there was no authority for the prosecution of the suit, but the Court of Appeals held otherwise, approving the holding in *United States* v. *Whitney* and distinguishing *United States* v. *Washington Imp. & D. Co.* In the opinion it was said (page 638):

> It is not to be supposed, we think, that Congress intended that the United States should have no remedy for the failure of an applicant to complete his canal, ditch, or reservoir within the time limited, unless Congress intervened and by a special act either declared the right forfeited or gave express authority to institute a suit to recover the land.

Certainly it would be an absurd thing to hold that in all cases involving a right of way under this Act, many of which affect but a comparatively

trifling number of acres of public lands, the Government must receive from Congress specific authority before suit is brought to secure a forfeiture. In practical operation such a ruling would result in great delay, inconvenience, and waste of time.

Where a vast grant of lands in aid of construction of a railroad is concerned, it can be readily appreciated that the attention of Congress might very properly be directed to the consideration of whether a failure to comply with all the terms of the grant, should be taken advantage of. This is especially so when the road has been constructed, the prime purpose for which the grant was made. There might be such considerations presented as to incline Congress to waive the breach of conditions. But in the instant case no such situation is presented, nor is one likely in rights of way granted under this Act of 1891. In any event, we do not concede that specific authority is necessary even as to railroad land grants. In such cases as have been presented to Congress and authorization given for suit, that course was adopted doubtless out of abundance of caution so that no question of that sort could be raised.

The Circuit Court of Appeals in the instant case took the view that regardless of the question whether a forfeiture could be secured in the suit, without specific statutory authorization, the Government was entitled to a decree setting aside the Secretary's approval of the right of way and for an injunction

restraining further use by appellants except upon permit allowed under the Act of February 15, 1901.

This view was grounded upon, and we think amply supported by, what was said by this court in *Noble* v. *Union River Logging R. R. Co.*, 147 U. S. 165. That case arose through a bill for an injunction against the Secretary of the Interior to restrain him from revoking his predecessor's approval of the company's application for a right of way under the Act of March 3, 1875, *supra*. In affirming a decree granting the injunction prayed for, this court said (p. 176):

> The railroad company became at once vested with a right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose. *If it were made to appear that the right of way had been obtained by fraud, a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained.* *Moffat* v. *United States*, 112 U. S. 24; *United States* v. *Minor*, 114 U. S. 233. (Italics ours.)

Furthermore, if the approval of the right of way was secured fraudulently, in equity no rights as against the Government were acquired by the grantee; and that would be true upon the theory that the approval was unauthorized, since the right of way was not to be used for purposes contemplated by the statute. Hence, an injunction would be an appropriate remedy against unlawful occupancy of the land. *Utah Power & Light Co.* v. *United States*, 243 U. S. 389.

II.

The approval of the Secretary of the Interior of the applications for right of way was secured by fraud, concealment, and misrepresentation.

A large part of the brief of appellants is devoted to a discussion of the facts relating to the securing of the approval of the right of way, and it is strenuously urged that no fraud in the procurement of the approval is shown by the record. We assert that the fraud is clear, gross and glaring, and the record shows it.

When the company first undertook to secure a right of way for a canal, it filed two maps with the Land Department as a part of its application for right of way for canal and pole lines and for necessary grounds for power plant for the purpose of generating and distributing electric power. It was stated that these maps were filed in order to obtain the benefits of sections 18 to 21 of the Act of March 3, 1891, *supra*, and the Act of May 14, 1896, c. 179, 29 Stat. 120. The Commissioner of the General Land Office, in passing upon said maps and application, wrote the register and receiver at Visalia, California, and refused to approve the maps in the form presented for reasons set forth in that letter. R. 26, 27. He said, with reference to the Acts of Congress involved (R. 26):

> The Department has held that "The two acts of March 3, 1891, and May 14, 1896, are so different in the character of estates or permission therein provided for, as well as in the

> uses to which the right of way may be devoted and the extent of such right of way, that no permission or grant can be sanctioned which is based on the two acts" (H. W. O'Melveny, 24 L. D. 560).

Thereupon, the company reformed its application and submitted it as an application for the canal under the Acts of March 3, 1891, and May 11, 1898, stating in a certificate of its president that the application was made to secure the benefit of those Acts and that "the right of way for such canal is desired solely for the purposes prescribed by the aforesaid acts," R. 46, 47. In the application, the company stated that the use to which the canal was to be devoted was: "Right of way for a canal for the purpose of irrigation and subsidiary purpose of the development of power," Answer, par. IV, R. 18.

Just previous to the approval of this application, the Secretary approved to the company a map for power house and transmission line under the Act of May 14, 1896.

The construction of the canal commenced in 1902 (Stipulation of facts, par. VI, R. 35), but no use was made of it until December 31, 1904, when the power plant went into operation, since which time it has been used for the development of electrical power for sale. Stipulation, par. IX, R. 36.

On December 23, 1904, as a result of certain suits brought against this company and others by Miller and Lux, the Kern River Company entered into an agreement with Miller and Lux which provided that

all water diverted by the company in this canal should be used solely for the purpose of generating power and for no other purpose. Stipulation, par. VII, R. 35.

The canal as constructed deviated from the location shown upon the map submitted with the first application, and thereafter the company, in January 1905, submitted application for an amended right of way under the 1891 and 1898 Acts. Stipulation, par. VIII, R. 36.

When this amended application came before the General Land Office, the Commissioner wrote the local land officers at Visalia as follows (Stipulation XVI, R. 37):

> The company's attention is called to the fact that unless the canal as shown by the amended survey of the amended definite location is desired for the purpose of irrigation only, the application cannot be granted under the act of March 3, 1891 (26 Stats. 1095) under which it is filed, but should be filed under the act of Feb. 15, 1901 (31 Stat. 790), which grants a permission to use the right of way over the public lands for irrigation and other purposes. See 32 L. D. 452, Denver, Northwestern & Pacific Ry. Co. vs. Hydro-Electric Power Co.

Upon receiving notification thereof, the company re-filed the application, and its president certified that the application was made to obtain the benefits of the two Acts of 1891 and 1898 and "I further certify that the right of way herein described is desired for public purposes," Ex. 7, R. 60, 61.

It is therefore clear that when the amended application was filed the Kern River Company had no thought, intention or purpose to use the canal for irrigation purposes but the sole purpose was to use it for power development. The company could not use it for irrigation purposes under the agreement with Miller and Lux, if it had ever intended to do so.

After the Commissioner of the General Land Office had informed the company that if it wanted this right of way for power purposes it should apply under the 1901 Act, did the company take issue with the Land Department and assert that it could properly come within the 1891 and 1898 Acts when it desired the right of way for power purposes? *Not at all.* It evaded the issue and renewed its application under those same acts—consequently, the Secretary understood that it was for irrigation principally, and not for power purposes solely, that the right of way was desired. Certainly that was the natural conclusion.

In their brief (p. 35) appellants say that fraud is never presumed and that "fair dealing is the normal presumption;" but the position of appellant companies is that that presumption is one which *courts* should indulge when called upon to relieve from fraud or misrepresentation, but that when an applicant seeks rights in public lands the *Secretary* can not indulge it. It may very pertinently be said that "fair dealing" would have suggested a frank and candid statement of the position of the company in making the application.

Again appellants, referring to the fact that the Secretary had specifically pointed out that if the right of way was not to be used for irrigation it could not be granted, say (Br., p. 30):

> Notwithstanding these circumstances, the company declined to so certify and certified as above stated that the right-of-way was desired for public purposes * * *.

We challenge them to point to any place in the record where it is shown that the company "declined to so certify." It did not decline at all. It evaded and dodged.

Notwithstanding these facts, appellants vigorously assert that there was no fraud and that fraud was not proved. They say (p. 35):

> One will look in vain for any misrepresentation, direct or indirect, on the part of appellant in obtaining the right of way.

Now that statement is of the same piece and just as disingenuous as the certificate which was made on the amended application. Of course, there was no direct statement that the right of way *was* desired for *irrigation purposes*, nor one that it was *not* desired for power purposes; and in a sense the generation of power is a *public use;* but what the company *refrained* from saying, and its conduct in the light of the objection to the application raised by the Secretary, condemn it absolutely.

To say the least, the company's conduct in the transaction was very "smooth."

To constitute actionable fraud and deceit, it is not necessary to show active misrepresentation; silence and evasiveness when a duty to speak and to be frank is imposed are just as reprehensible as the positive spoken untruth.

It is important to note the probable cause of the company's desire to secure a right of way under the 1891 and 1898 Acts, rather than to come under the 1901 Act. Under the first two mentioned Acts a grant of a right of way over public lands was secured which was permanent in its nature. The Act of February 15, 1901, authorized the issuance of a *permit* under rules and regulations to be established by the Secretary of the Interior, and there was a proviso:

> That any permission given by the Secretary of the Interior under the provisions of this act may be revoked * * * in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

Thus, it is at once apparent that the right under the 1891 and 1898 Acts was the more desirable, since it vested a substantial interest in the land, did not subject the grantee to regulation, and gave permanency to the tenure. This undoubtedly furnished the motive for the company's conduct.

It is strenuously argued, however, that no deception was practiced on the Land Department because the Act of 1898 permitted the acquisition of right of way for canals "for purposes of a public nature"; that when the amended application was re-filed after the

suggestion had been made of the applicability of the 1901 Act if a power proposition was contemplated, the certificate was that the right of way was desired for "public purposes."

The history of the legislation which resulted in the Act of May, 18, 1898, *supra*, and an analysis of that and the other Acts granting rights of way and authorizing permits for rights of way, demonstrate that this assertion is without foundation.

The Act of March 3, 1891, as we have seen, granted a right of way for canals used for irrigation. By an Act of January 21, 1895, c. 37, 28 Stat. 635, Congress conferred authority upon the Secretary of the Interior to permit, under general regulations, the use of a right of way for tramroads, canals and reservoirs to any citizen or association of citizens engaged in *mining or quarrying or cutting timber and manufacturing lumber*. The Act of May 11, 1898, *supra*, which is so much relied upon by appellants, amended the Act of January 21, 1895, by enlarging the right conferred by the previous Act so as to confer a right of way where it was to be used for *furnishing water for domestic use*.

The Act further amended the Act of March 3, 1891, so as to allow the right of way therein provided for to be for purposes of a public nature, but after so providing, proceeded to set forth certain purposes for which the right of way might be used, and included in that was "for the development of power, as subsidiary to the main purpose of irrigation."

Here in the express terms of the Act we have a clear distinction between "public purposes" and "power purposes." If "public purposes" had contemplated "power development," it would have been unnecessary to have specified the latter. But Congress gave plain evidence that power development was not thus included when it limited the use to development of power *as subsidiary to the main purpose of irrigation*. In other words, the 1891 and 1898 Acts dealt with rights of way primarily for irrigation, domestic and beneficial use of water.

The history of the 1898 legislation bears out this analysis. It was first considered in the 54th Congress, 2nd session. As originally proposed, it provided that the Act of January 21, 1895, be amended by adding thereto the following:

> That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way upon the public lands of the United States, not within the limits of any park, forest, military or Indian reservation, for tramways, canals, or reservoirs, and fifty feet on each side of the marginal limits thereof, by any citizen or association of citizens of the United States, or corporation for the purpose of furnishing water for domestic, public, and other beneficial uses; and all rights of way heretofore granted, or the applications for which have been made under the act approved March third, eighteen hundred and ninety-one, and entitled "An

> Act to repeal timber-culture laws, and for other purposes," may be used for said purposes.

In its report, No. 2790, the House Committee on Public Lands said:

> The purpose and effect of this bill is to allow the use of the right of way through the public lands for the purpose of furnishing water for domestic purposes. The right of way is now allowed by law for furnishing water for irrigation, mining, and reservoir purposes, and your committee can not conceive of any better or higher purpose for the use of the right of way than for furnishing the water for domestic and public use.

It was also recommended that a new section be added (section 2), which is the particular section in question in this case.

With the report is a communication from the Secretary of the Interior, who transmitted a report made to him by the Assistant Commissioner of the General Land Office. In the Secretary's letter recommendation was made that all parts of the bill relating to rights of way under the Act of March 3, 1891, be stricken from it. The reason given was:

> Sections 18 to 21, inclusive, of the act of March 3, 1891 (26 Stat. L., 1095), grant a right of way through the public lands for reservoirs and canals under the regulations of this Department, and maps filed for the approval of this Department are required to contain a certificate that the right of way is desired for irrigation purposes only.

I do not believe that it would be for the public benefit to have the rights of way granted under that act to be subject to the uses contemplated in the act in question, but that it would tend to confuse the right-of-way acts now in existence.

In his letter the Assistant Commissioner said:

The last clause permits the rights of way granted or those for which applications are pending under sections 18 to 21, act of March 3, 1891 (26 Stat. L., 1095), to be used for "furnishing water for domestic, public, and other beneficial uses." The effect would be to destroy all distinction between the acts of 1891 and 1895 above noted. The act of 1891 grants an easement, irrevocable so long as it is used for the purposes provided by the act, held by the Department to include irrigation purposes only, while the act of 1895 authorizes merely a license to use the public land, which is revocable, and which terminates with the disposal of the land by the United States, for the purposes of "mining or quarrying or cutting timber and manufacturing lumber." The easement for irrigation under the act of 1891 being of the nature of a public benefit, the license under the act of 1895 being of the nature of a private benefit. By allowing the easement granted under the act of 1891 to be used for "other beneficial uses," it would permit the right of way to be used for mining, quarrying, or lumbering, and would open the grant of the easement to all sorts of private uses, under the well-settled rulings of the courts of the Western

States in construing the words "beneficial use" in the local laws. This would be contrary to the spirit of the acts of 1891 and 1895 as understood by this office, in distinguishing between public and private uses, and appears, therefore, very objectionable.

I am of the opinion that if it were allowable to use the right of way for domestic or public purposes or for certain other purposes, which will not diminish the amount of water available for irrigation, as subsidiary to the main purpose of irrigation, the act of 1891 would be much more satisfactory in its operation and the intention of the act as conferring a general benefit would be fully subserved. I would therefore recommend that all after the word "uses" in line 16 be omitted, and the following added:

"SEC. 2. That rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the act entitled 'An act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature. And said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation."

The bill did not become a law, but the matter was again proposed in the 55th Congress, 2nd session, as H. R. 1595, and did become a law.

In the report on this bill (House Rep. 279), the Committee on Public Lands, after referring to the fact that the bill was identical with H. R. 9607 which had been drawn in accordance with the recommendations of the Secretary of the Interior and the Commissioner of the General Land Office, stated:

> The purposes and objects of this bill are to allow the use of rights of way over the public domain, not within the limits of any park, forest, military or Indian reservation, for the purposes of supplying water for domestic and public purposes. Such rights of way are now allowed by law for furnishing water for irrigation, mining, and reservoir purposes, and your committee can not conceive of any higher or better purposes for the use of such rights of way than for furnishing water for domestic and public uses. Such a law will accrue to the advantage of supplying a pure-water system to many cities and towns in many of the States and Territories, and aid in supplying the same for many other useful purposes.

When the bill was considered in the House, Mr. DeVries, in charge of it, in response to a question as to what change was made in the law by the proposed legislation, said (Cong. Rec., vol. 31, pt. 2, p. 1435):

> I will say, Mr. Speaker, that under the law as it stands at the present time all rights of way for the construction of reservoirs, canals, and ditches through the public do-

> main are limited to those the purposes of which are the furnishing of water for irrigation, mining, and reservoir purposes. It does not permit its use for private or domestic purposes, and if it is desired to supply a city from a reservoir or canal across the public domain such permission is not authorized by the law as it stands at present. It is therefore sought to amend the law by this bill, extending and enlarging the existing privileges and allowing a license over the public domain for these purposes. The bill was favorably reported in the Fifty-fourth Congress, and was passed by the House.

Again, Congress has enacted specific legislation for granting of rights where electrical or other power development was involved. These Acts granted different privileges than the "water" right of way Acts.

Thus the Act of May 14, 1896, c. 179, 29 Stat. 120, authorized the Secretary of the Interior, under general regulations, to *permit* the use of right of way upon the public lands and forest reservations, for the purposes of generating, manufacturing or distributing electric power.

This was followed by the Act of February 15, 1901, *supra*, which, as has already been said, authorized the Secretary of the Interior to *permit* under regulations, the use of rights of way over the public lands, forest and other reservations, etc. "for electrical plants, poles, and lines for the generation and distribution of electrical power" etc.

This legislation was existent when the Kern River Company filed its amended application in 1905, and all except the 1901 statute was in force when it filed its first application.

In all the legislation where rights were to be granted for power development, Congress has not authorized a *grant*, but a *permit*, the only modification being in the Act of 1898, where the right of way for canals was authorized to be used for power development *as subsidiary* to the main purpose of irrigation.

Not only does the history of the legislation sustain that view, but the Land Department has uniformly construed the right of way granted by the Act of March 3, 1891, to be one for irrigation only, and under the amendment by the Act of May 11, 1898, as for irrigation primarily and power development as subsidiary. Thus in the case of *Sinclair et al.*, 18 L. D. 573, it was said of the grant made by the Act of 1891 (pp. 573, 574):

> The grant made by this act restricts the use of the land over which the right of way is granted, to purposes of irrigation. The applications of Sinclair and Baldwin state that they desire the use of the water for the purpose of generating electricity to be used in the lighting of certain cities; this is outside of the scope and purpose of the act of March 3, 1891 (*supra*), and, consequently, no approval of any claimed right of way under said act could be granted.

To the same effect are *South Platte Canal & Res. Co.*, 20 L. D. 154, 156; *Chaffee County Ditch & Canal Co.*, 21 L. D. 63, 65; *William Marr*, 25 L. D. 344, 345.

In an opinion to the Secretary of the Interior, Mr. Assistant Attorney General Van Devanter, now Mr. Justice Van Devanter, considered the effect of the amendment of the Act of March 3, 1891, made by the Act of May 11, 1898, and said (28 L. D. 474, at p. 476):

> The act of May 11, 1898, *supra*, purports to be an amendment of the act of 1895, and section one relates only to the public lands not within the limits of any reservation. Section two is in effect amendatory of the act of 1891, and relates to all lands coming within the purview of that act, which embraced both public lands and reservations of the United States. It provides that the rights of way granted under the act of 1891 may be used for purposes of a public nature and for water transportation, domestic purposes and for the development of power. This section does not purport to make any new grant, but simply permits the rights of way granted by the act of 1891 to be used for other purposes than that of irrigation. No new class of grantees is described in this section, and to determine who may be entitled to a right of way it is necessary to turn to the act of 1891. There the grantees are described as "any canal or ditch company formed for the purpose of irrigation." If it had been intended to enlarge the class of grantees some apt language similar to that of the first section would have

> been used in this second section of the act of 1898. *The controlling idea was still, as in the act of 1891, irrigation.* (Italics ours.)

This opinion was followed in *Town of Delta*, 32 L. D. 461, 462; *Inyo Consolidated Water Co.*, 37 L. D. 78,79.

It is important to note that the opinion in 28 L. D., 474, was given June 6, 1899, just about one year after the Kern River Company's *first* application had been filed and less than two months after it had been approved. That opinion and the decision in *Town of Delta*, *supra*, were rendered before the *second* or amended application was filed in 1905. The Kern River Company, if it did not have actual notice, was chargeable at that time with notice of the ruling of the Land Department on the effect of the amendment contained in the Act of May 11, 1898.

This, we think, disposes of the contention that "public purposes" under the 1898 Act contemplated the purposes for which the Kern River Company desired the right of way, and that therefore there was no misrepresentation in the application and that the Secretary of the Interior was not deceived or misled by the statement in the certificate.

Appellants criticize (Br. 99, 100) the finding of the Circuit Court of Appeals that the representation in the certificate accompanying the second or amended application that the right of way was sought "for public purposes" was unqualifiedly false. But their brief then goes on to demonstrate fully that the right of way was desired for power purposes, although that is rather obscured by a reference to what the company

intended to do when it filed its *first* application and before it compromised with Miller and Lux, pp. 100, 101, 102.

They say the Court of Appeals assumed the whole point in the case, "namely, that the appellant acquired its right-of-way by fraud and for purposes other than the use to which it is being put, and that the use to which it is being put is not authorized by law."

Now, if our view of the use is correct, the Court of Appeals surely had proof of the fraud in the record. It did not base its decision, however, upon the assumption that the use being made of the right of way was other than what it was; on the contrary, that was one of the bases of the holding, for it found that the fraud consisted in representing that the right of way was desired for a use other than that to which it was intended to be put and to which it was and now is put.

The contention of appellants may be summed up thus:

Power development is a public purpose; we certified that we desired the right of way for "public purposes," *ergo*, there was no misrepresentation.

The vice of that contention lies in this, that power development was not such a public purpose as came within the intendment of the Acts of 1891 and 1898, and the Kern River Company knew it, for it had been so informed by the Land Department when it was told that if a power proposition was contemplated it should apply under the 1901 Act.

Counsel for appellants apparently realize the speciousness of the contention that the company was not guilty of fraud with respect to the transaction, and therefore seek to bolster their position by asserting that the Secretary could not have been misled because:

(1) The articles of incorporation of the company expressly provided, among other purposes, for that of supplying and storing water for the operation of machinery for the generation and transmission of electric and other power, and these articles of incorporation were filed with the Land Department. Appellants' brief, p. 20.

We suppose that the inference to which they hope to lead is that this put the Secretary on notice of the character of the Kern River Company's business and hence counteracted any evasion indulged in with regard to the application. But they fail to say that the articles also provided for construction and maintenance of canals, etc. for carrying water for irrigation. Bill, par. II, R. 2.

(2) In 1896, prior to the organization of the company, a prospectus was issued by a predecessor company showing it was the purpose of the Kern River Company to engage in the enterprise of irrigation and the generation of electrical energy. "The record does not disclose whether the Department of Interior was then aware of this prospectus. There was, however, no evidence introduced to show the contrary." Brief, pp. 23, 24.

The resort to these trifling details shows the want of real merit in answer to the charge of fraud and misrepresentation. They do not deserve serious consideration, and we refer to them only for the purpose of indicating the character of the defense.

III.

The Secretary's approval was beyond his authority, since the acts under which the applications were made did not contemplate use of the right of way solely for power-generating purposes.

For the purposes of the argument under this proposition, we may assume that fraud in the procurement of the allowance of the Secretary's approval of the applications has not been proved. However, we contend that even if all the facts were known to the Secretary it was beyond his power to approve the right of way, because it was not desired or intended to be used for the purposes contemplated by the Acts of 1891 and 1898.

It is conceded that the company has never used the canal for irrigation purposes and that it has been used solely for the purpose of carrying water to be used to generate electrical power. Stipulation, par. XXVI, R. 38. Moreover, there is no dispute that when the amended application was filed in 1905 the company had no *intention* of using the canal for irrigation, but, on the contrary, only for generating power.

Under these circumstances, even if these facts were known to the Secretary, he could not lawfully approve the right of way to the company. The Acts of 1891 and 1898 did not authorize the approval of a right of

way for the purpose for which the Kern River Company desired it. The Secretary of the Interior was authorized to approve rights of way only for the purposes specified. Hence, the approval of the right of way under these Acts was clearly void.

The Court of Appeals succinctly stated the proposition thus (R. 75; 264 Fed. 417):

> . . . if we should accept the appellees' view of the case, and find that the approval of the Secretary was given with full knowledge of all the facts, it would not avail them, because in that event the Secretary simply exceeded his authority, and the validity of his approval may well be challenged in a suit of this kind. Thus, in United States v. Poland, 251 U. S. 221, 40 Sup. Ct. 127, 64 L. Ed. —, decided January 5, 1920, the Supreme Court held that patents issued for more than 160 acres in a single body in the territory of Alaska under soldiers' additional homestead rights, were void, notwithstanding there was no fraud and the patents issued with full knowledge of all the facts.

A somewhat extended argument is made by appellants to support a defense that this suit is barred under section 8 of the Act of March 3, 1891, 26 Stat. 1095, 1099, and particular point is made of the fact that this section must be held to embrace suits affecting rights of way because it occurs in the same Act as do the sections providing for grants of right of way. The section referred to provides that suits to cancel *patents* thereafter issued shall be brought within six years after the date of the *patent*. It is

insisted that the word "patent" was intended and should be construed to embrace any act of an executive officer by which a title to or interest in public lands is vested.

We assert that being a statute of limitations against the Government, it must be strictly construed and not held to embrace more than clearly indicated by its terms, *United States* v. *Whited & Wheless*, 246 U. S. 552; further, that it can have no application to rights of way, for very obvious reasons. Thus: suppose a right were used seven years and then abandoned. Under appellants' theory no action could be maintained against the grantee. Or, suppose there had been no work of construction of the canal or ditch, which, under section 21, must be completed within five years. Of course, no suit to cancel for non-construction could be brought until after the expiration of the five years, and yet, according to appellants, it must be brought within six years. In other words, instead of having six years in which to bring suit the Government would have but one year, and, in the first supposed case, its right of action would be barred before it accrued.

CONCLUSION.

The decree of the Circuit Court of Appeals was right and should be affirmed.

Respectfully submitted.

LESLIE C. GARNETT,
H. L. UNDERWOOD,
Special Assistants to the Attorney General.

APRIL, 1921.

KERN RIVER COMPANY ET AL. v. UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 50. Argued October 20, 21, 1921.—Decided November 21, 1921.

1. A right of way through public lands or reservations, obtained through an approval by the Secretary of the Interior of an application under the Act of March 3, 1891, c. 561, §§ 18–21, 26 Stat. 1095, is neither an easement nor a fee simple absolute, but a limited fee on implied condition of reverter in the event the grantee ceases to use or retain the land for the purpose named in the act—irrigation. P. 151.
2. The Act of May 14, 1896, c. 179, 29 Stat. 120, which made special provision for rights of way through public lands and forest reservations for the purpose of developing electric power, allowing a revocable permit or license and not a limited fee, was superseded by the Act of February 15, 1901, c. 372, 31 Stat. 790, which deals with the subject along similar lines. P. 152. *Utah Power & Light Co. v. United States*, 243 U. S. 389.

3. The Act of May 11, 1898, c. 292, 30 Stat. 404, provided that rights of way approved under the Act of March 3, 1891, *supra*, "may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation." *Held*, construing it in the light of legislative history and administrative construction, that the use "for purposes of a public nature" must be "subsidiary to the main purpose of irrigation." P. 152.
4. Whether the use of such a right of way for the generation of electric power which is transmitted to other places and there commercially supplied for use in operating electric railways, lighting municipalities and operating pumps on farms and ranches, is to be classed as a use for "purposes of a public nature" or as a "development of power" within the meaning of the Act of May 11, 1898, *supra*, in either event it is a use which that act permits only where it is subsidiary to irrigation, and can not take the place of the latter as the main purpose to which the right of way must be devoted. P. 154.
5. Where such a right of way has never been used for irrigation, and the grantees are effectually and permanently precluded from so using it by agreement and by a consent decree, the condition of the grant is not only broken but rendered impossible of performance, and the United States is entitled to a forfeiture. P. 154.
6. For the assertion and enforcement of the forfeiture of the grant an act of Congress declaring it or directing suit is not necessary; these objects may be accomplished through a suit brought by the Attorney General, under his general authority, where no act of Congress forbids. P. 154.
7. Where the right to a forfeiture is clear, and asserted in the public interest, a court of equity will not withhold appropriate relief. P. 155.
8. A suit to enforce a forfeiture of a right of way granted through an approval by the Secretary, for a breach of a condition subsequent, is not subject to the six year limitation imposed by the Act of March 3, 1891, c. 559, 26 Stat. 1093, on "suits to vacate and annul patents." P. 155.

264 Fed. 412, modified and affirmed.

APPEAL from a decree of the Circuit Court of Appeals reversing a decree of the District Court and directing that court to enter another canceling an approval of an

application for a right of way for canal purposes, which approval had been granted by the Secretary of the Interior under the Acts of March 3, 1891, c. 561, 26 Stat. 1095, and May 11, 1898, c. 292, 30 Stat. 404, and enjoining the present appellants from further maintenance of their canal, unless within a reasonable time they applied for and obtained a lawful permit or license therefor.

Mr. James A. Gibson, with whom *Mr. Roy V. Reppy* and *Mr. Henry F. Prince* were on the brief, for appellants.

Mr. Assistant Attorney General Riter, with whom *Mr. Leslie C. Garnett* and *Mr. H. L. Underwood,* Special Assistants to the Attorney General, were on the brief, for the United States.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

A right of way for a canal, several miles in length, through lands of the United States in a public forest reserve, in California, is here in controversy. The right of way was acquired by the Kern River Company, one of the appellants, through the approval by the Secretary of the Interior of an original map of the canal on April 14, 1899, and of an amended map on November 27, 1905. The purpose of the amended map was to conform the right of way to intervening changes in the line of the canal. The Secretary's approval, in both instances, was sought and was given under §§ 18–21 of the Act of March 3, 1891, c. 561, 26 Stat. 1095, as supplemented by § 2 of the Act of May 11, 1898, c. 292, 30 Stat. 404. The canal was constructed between July, 1902, and December, 1904, and ever since has been used for developing electric power, but never for irrigation. The power is transmitted to other parts of the State and there commercially supplied for use in operating electric railway systems, lighting municipalities and operating pumping appliances on farms and ranches. The

appellants other than the Kern River Company claim under and through that company.

This suit in equity was brought by the United States to obtain (a) a cancelation of the Secretary's approval of the two maps on the ground that it was obtained fraudulently by falsely representing that the right of way was sought with irrigation as the main purpose and the development of electric power as a subsidiary purpose, when in truth the latter was the sole purpose, or (b) a judicial declaration and enforcement of a forfeiture of the right of way on the ground that, although granted on condition that it be used mainly for irrigation, it in fact has been used solely for developing electric power and its use for irrigation is precluded by a binding and continuing agreement on the part of the grantee. In the bill the first phase of the suit is set forth with greater precision and detail than are shown in the presentation of the other; but the other is there in full substance.[1]

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[1] The District Court, in a memorandum opinion, said:

"There are two aspects of this bill. One charges fraud perpetrated upon the Government in the application for the grant. The other relies upon a forfeiture of the grant by reason of the alleged non-performance by the defendant of the condition subsequent in the grant or a breach of a continuing covenant." And also: "The defendant is not using the right of way for irrigation and never has so used it, and the plaintiff claims that the grant should be forfeited to the Government for failure to so use said right of way."

The Circuit Court of Appeals, taking a different view, said:

"This is not a suit to declare a forfeiture of a land grant for breach of condition, but the ordinary suit to set aside the approval of the Secretary of the Interior on the ground of fraud and mistake."

The appellants, in their brief in this court, speak of the suit as one "seeking to forfeit the right of way" and also say:

"The bill was brought against appellant, Kern River Company, on the ground that the right of way had been obtained by fraud and misrepresentation and upon the ground that appellant was using the right of way for purposes other than those for which it had been acquired, namely, for purposes other than irrigation or power purposes subsidiary to the main purpose of irrigation."

The bill, while thus assailing the right of way obtained under the Acts of 1891 and 1898, concedes that the appellants may yet apply for and obtain, under the Act of February 15, 1901, c. 372, 31 Stat. 790, a permit or license to use the land for the purpose to which they now are applying it.

After issue was joined the cause was heard on an agreed statement of facts supplemented by the testimony of a single witness and by some documentary proof.

The District Court concluded that the charge of fraud in procuring the Secretary's approval was not sustained, and that, in the absence of an act of Congress declaring a forfeiture or providing for a suit to that end, a forfeiture could not be decreed by the court. The bill was accordingly dismissed. On appeal by the United States the Circuit Court of Appeals concluded that the charge of fraud was adequately proved, and also that, if the Secretary acted with full knowledge of the facts, he exceeded his authority. So the decree of dismissal was reversed with directions that a decree be entered canceling the Secretary's approval, and also enjoining the further maintenance of the canal unless within a reasonable time the claimants applied for and obtained a lawful permit or license to use the same. 264 Fed. 412.

The Act of 1891, §§ 18–21, provided for rights of way through the public lands and reservations of the United States for ditches, canals and reservoirs for the purpose of irrigation, but not for any other purpose. These rights of way were to be obtained by making application at the local land office and ultimately securing the approval by the Secretary of the Interior of a map of the ditch, canal or reservoir. There was no provision for a patent. The grant was to become effective when the approval was given; that is to say, the right of way was then to vest in the applicant for the purpose indicated in the act. The approval, once given, could not be recalled or annulled by

the Secretary, either for fraud practiced in procuring it or for mistake in giving it. To do that it was necessary to resort to a suit in equity. *Noble* v. *Union River Logging R. R. Co.*, 147 U. S. 165, 172, 176. The right of way intended by the act was neither a mere easement nor a fee simple absolute, but a limited fee on an implied condition of reverter in the event the grantee ceased to use or retain the land for the purpose indicated in the act. *Rio Grande Western Ry. Co.* v. *Stringham*, 239 U. S. 44, 47.

An Act of May 14, 1896, c. 179, 29 Stat. 120, made express provision for rights of way through the public lands and forest reservations for the purpose of developing electric power; but this act differed from the one of 1891 in several respects, the one of most significance being that what the beneficiary was to receive was a revocable permit or license, and not a limited fee. This act was superseded by that of February 15, 1901, *supra*, which deals with the same subject along similar lines. *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 407.

The Act of May 11, 1898, enacted while those of 1891 and 1896 were in force, provided in its second section:

"That the rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the Act entitled 'An Act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation."

This section did no more than to permit rights of way obtained under the Act of 1891, the use of which was restricted to irrigation, to be also used for the other purposes named in the section. Irrigation was still to be the "main purpose" and the other purposes were to be sub-

sidiary. True, there are in the section words and punctuation from which it might be argued that the "purposes of a public nature" were to be independent and might even be exclusive; but the fair import of the section as a whole is the other way. Besides, its legislative history indicates that what actually was intended was to recognize irrigation as the primary purpose and to make all the other purposes secondary to it. When the bill was introduced in Congress it contained a provision declaring, without any qualification, that rights of way under the Act of 1891 might be used for supplying water for "domestic, public, and other beneficial uses." The committee in charge of the bill sought the views of the Land Department, and the Assistant Commissioner of the General Land Office submitted a report wherein he criticised that provision as being too much of a departure from the principle and spirit of the Act of 1891 and recommended that it be eliminated and the present section substituted in its stead. In explaining and commending the section he said: "If it were allowable to use the right of way for domestic or public purposes or for certain other purposes, which will not diminish the amount of water available for irrigation, as subsidiary to the main purpose of irrigation, the act of 1891 would be much more satisfactory in its operation and the intention of the act as conferring a general benefit would be fully subserved." The bill was amended in accordance with his recommendation and was enacted in that form. House Report, No. 2790, 54th Cong., 2d sess.; House Report, No. 279, 55th Cong., 2d sess. In administering the Act of 1891 as thus supplemented the Secretary of the Interior was called upon to construe the section on several occasions and his decisions were uniformly to the effect that it regarded irrigation as the controlling purpose and all the other uses as essentially subsidiary. See 28 L. D. 474; 32 L. D. 452 and 461;

37 L. D. 78; House Doc. No. 5, pp. xii–xiii, 56th Cong., 1st sess.; *Utah Power & Light Co.* v. *United States, supra.* Even if the meaning were not otherwise made plain, we should be slow to reject the construction thus put on the section by the head of the department charged with administering it. *Logan* v. *Davis,* 233 U. S. 613, 627.

The appellants take the position that the purposes for which they are selling the electric power are such as to make their use of the right of way a use for "purposes of a public nature" in the sense of that section. But of this it suffices to say that whether such a use be regarded as falling under that head or under the one described as the "development of power," it is a use which the section permits only where it is subsidiary to irrigation. It cannot take the place of the latter as the main purpose.

With this understanding of the statutes under which the right of way was obtained, we pass the controverted charge of fraud in procuring the Secretary's approval and come at once to the question of forfeiture.

The right of way, as we have seen, was granted on an implied condition that it should revert to the United States in the event the grantee ceased to use or retain it for the purpose indicated in the statutes. That purpose—the main and controlling one—was irrigation. The agreed statement of facts shows that the right of way never has been used for irrigation, and also that the appellants are effectually and permanently precluded from using it for that purpose by reason of an agreement entered into by the grantee and of a judicial decree to the rendition of which the grantee expressly consented. Thus it appears that the condition on which the grant was made has been not only broken but also rendered impossible of performance. This entitles the United States to assert and enforce a forfeiture of the grant; and it is for this purpose that the present suit is brought. True, Congress has neither declared a forfeiture nor directed the suit; but

this is not a valid objection. In the absence of some legislative direction to the contrary, and there is none, the general authority of the Attorney General in respect of the pleas of the United States and the litigation which is necessary to establish and safeguard its rights affords ample warrant for the institution and prosecution by him of a suit such as this. *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 278–285. A suit brought in virtue of that authority and otherwise appropriate to the occasion is authorized by law in the sense of our decisions. See *United States* v. *Repentigny*, 5 Wall. 211, 267–268; *Atlantic & Pacific R. R. Co.* v. *Mingus*, 165 U. S. 413, 430–434; *Spokane & British Columbia Ry. Co.* v. *Washington & Great Northern Ry. Co.*, 219 U. S. 166, 173–174. This suit meets these requirements.

The appellants invoke the rule that a court of equity usually is reluctant to lend its aid in enforcing a forfeiture. But where, as here, the right to the forfeiture is clear and is asserted in the public interest, equitable relief, if otherwise appropriate, is not withheld. *Farnsworth* v. *Minnesota & Pacific R. R. Co.*, 92 U. S. 49, 68; *Union Land & Stock Co.* v. *United States*, 257 Fed. 635.

The statute placing a limitation of six years on the time within which "suits to vacate and annul patents" may be brought (Act March 3, 1891, c. 559, 26 Stat. 1093) is also relied on. But in so far as this suit seeks to enforce a forfeiture for a breach of a condition subsequent it plainly is not a suit to vacate or annul a patent and so is not within the statute.

We conclude that the United States is entitled to a decree declaring and enforcing a forfeiture. This renders it unnecessary to deal with the other phase of the suit.

The decree of the Circuit Court of Appeals is accordingly so modified as to direct the District Court to enter a decree declaring and enforcing a forfeiture of the right of way, and also enjoining the appellants from further

occupying or using the land, unless within some reasonable time, to be fixed by that court, they apply for and obtain a right or license to use the same under the Act of February 15, 1901, or some other applicable statute, and as so modified is affirmed.

Decree modified and affirmed.